No. 14-6368

Title:	Michael B. Kingsley, Petitioner v. Stan Hendrickson, et al.
Docketed:	September 23, 2014
Linked with 14A11	
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(12-3639)
Decision Date:	March 3, 2014
Rehearing Denied:	April 18, 2014

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 2 2014	Application (14A11) to extend the time to file a petition for a writ of certiorari from July 17, 2014 to August 18, 2014, submitted to Justice Kagan.
Jul 2 2014	Application (14A11) granted by Justice Kagan extending the time to file until August 18, 2014.
Aug 18 2014	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 23, 2014)
Oct 10 2014	Waiver of right of respondents Stan Hendrickson, et al. to respond filed.
Oct 23 2014	DISTRIBUTED for Conference of November 7, 2014.
Oct 28 2014	Response Requested . (Due November 28, 2014)
Nov 24 2014	Order extending time to file response to petition to and including December 5, 2014.
Dec 4 2014	Brief of respondents Stan Hendrickson, et al. in opposition filed.
Dec 17 2014	Reply of petitioner Michael B. Kingsley filed. (Distributed)
Dec 18 2014	DISTRIBUTED for Conference of January 9, 2015.
Jan 12 2015	DISTRIBUTED for Conference of January 16, 2015.
Jan 16 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Feb 10 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Feb 19 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Mar 2 2015	Brief of petitioner Michael B. Kingsley filed.
Mar 2 2015	Joint appendix filed.
Mar 6 2015	SET FOR ARGUMENT ON Monday, April 27, 2015
Mar 6 2015	Brief amicus curiae of The Rutherford Institute filed. (Distributed)
Mar 9 2015	Brief amici curiae of Former Corrections Administrators and Experts filed.
Mar 9 2015	Brief amici curiae of American Civil Liberties Union, et al. filed.
Mar 9 2015	Brief amicus curiae of The National Association of Criminal Defense Lawyers filed.
Mar 9 2015	Brief amici curiae of National Sheriffs' Association et al. filed (REPRINTED).

	(Distributed)
Mar 16 2015	CIRCULATED.
Mar 17 2015	Record requested from U.S.C.A. 7th Circuit.
Mar 17 2015	Brief amicus curiae of the United States supporting affirmance filed. (Distributed)
Mar 17 2015	Record from U.S.C.A. 7th Circuit is electronic and located on PACER.
Mar 24 2015	Record received from U.S.D.C. Western Dist. of Wisconsin is electronic and SEALED.
Apr 1 2015	Brief of respondents Stan Hendrickson, et al. filed. (Distributed)
Apr 8 2015	Brief amici curiae of National Association of Counties, et al. filed. (Distributed)
Apr 8 2015	Brief amici curiae of Indiana, et al. filed. (Distributed)
Apr 8 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 17 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 17 2015	Reply of petitioner Michael B. Kingsley filed. (Distributed)
Apr 27 2015	Argued. For petitioner: Wendy M. Ward, Madison, Wis. For United States as amicus curiae: John F. Bash, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondents: Paul D. Clement, Washington, D.C.
Jun 22 2015	Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas, J., joined. Alito, J., filed a dissenting opinion.
Jul 24 2015	JUDGMENT ISSUED.

No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,
Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,
Respondents.

ORIGINAL

Supreme Court, U.S.
FILED
AUG 18 2014
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All the parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kingsley respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 744 F.3d 443 and is reproduced in the appendix to this petition at Pet. App. 1a-48a. The judgment of the Western District of Wisconsin is unpublished and is reproduced at Pet. App. 72a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on March 3, 2014, Pet. App. 49a, and denied Mr. Kingsley's petition for rehearing en banc on April 18, 2014, Pet. App. 50a-51a. On July 2, 2014, this Court granted an application (No. 14A11) to extend the time to file a petition for a writ of certiorari until August 18, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

The decision of the Seventh Circuit in this case represents one position of several in a split among the federal courts of appeals on the question of whether an excessive force claim pursuant to 42 U.S.C. § 1983 brought by a pretrial detainee requires a showing of the state actor's subjective intent in addition to the objective unreasonableness of the force. Five circuit courts have held that the plaintiff need not prove the subjective intent of the state actor to cause harm at the time the force was used. The Seventh Circuit, along with five other circuits, however, has held that the plaintiff must shoulder the additional burden of

proving that the state actor used force against the pretrial detainee with the intent to violate his constitutional rights.

As a result of these differing standards, the success of a pretrial detainee's excessive force claim depends, in part, on where the claim is brought.

I. BACKGROUND OF THE CASE

A. Factual Background

Petitioner Michael Kingsley was arrested and booked as a pretrial detainee into Monroe County Jail in Sparta, Wisconsin on April 21, 2010. Pet. App. 2a, 54a. On May 20-21, 2010, jail officers ordered Mr. Kingsley to remove a piece of paper that was affixed to the light in his cell. Mr. Kingsley told the officers that he had not put the paper there, and refused to remove it. Pet. App. 54a-55a. Consequently, the officers decided to transfer him to a "receiving" cell so that jail staff could remove the paper. Pet. App. 56a.

Defendants, Sergeant Stan Hendrickson and Deputy Fritz Degner, and others participated in transferring Mr. Kingsley to the receiving cell. *Id.* To do so, the officers first entered Mr. Kingsley's original cell, handcuffed him behind his back while he was lying face down on his bunk, and carried him from the original cell to the receiving cell. Pet. App. 56a-57a. Portions of the transfer were captured on video. Pet. App. 57a. During the transfer, Mr. Kingsley did not walk of his own volition but did not threaten or actively resist the officers—rather, he groaned and complained that he could not walk because the officers had banged his leg against the bunk in picking him up. Pet. App. 4a.

In the receiving cell, Mr. Kingsley was placed face down onto a cement bunk with his hands handcuffed

behind his back. Pet. App. 57a. Five corrections officers, blocking the view of the cell's only camera, surrounded Mr. Kingsley. Pet. App. 57a-58a. The officers tried to remove the handcuffs, but had difficulty doing so. Pet. App. 58a. According to the officers, Mr. Kingsley was tensing his arms and resisting removal of the handcuffs—an allegation Mr. Kingsley denies. *Id.*; Pet. App. 5a. Sergeant Hendrickson directed Deputy Degner to "tase" Mr. Kingsley, ostensibly to permit the officers to remove the handcuffs. Pet. App. 5a n.4. Deputy Degner "tased" Mr. Kingsley on his upper back for five seconds, resulting in extreme pain. Pet. App. 5a. Afterwards the officers left him alone in the cell while still handcuffed. Pet. App. 58a. Other officers were later able to remove Mr. Kingsley's handcuffs without incident. Pet. App. 59a.

B. Proceedings Below

Mr. Kingsley filed suit pro se pursuant to 42 U.S.C. § 1983 alleging Sergeant Hendrickson and Deputy Degner used excessive force during the incident, violating his right to be free from punishment as a pretrial detainee. Pet. App. 6a. The officers filed a motion for summary judgment, which the district court denied after viewing a video of the events in the receiving cell. *Id.* Specifically, the court ruled there was a genuine issue of material fact whether the officers' use of force was disproportionate to the situation. Pet. App. 63a-64a. Following the denial of the officers' motion for summary judgment, the district court appointed pro bono counsel to represent Mr. Kingsley at trial. Pet. App. 7a.

At the trial, both parties presented experts on the use of force. Mr. Kingsley presented the testimony of an expert witness, Brian Landers, a veteran police officer, academy instructor, and a member of the Wisconsin Department of Justice Tactical Advisory

Committee on Defense and Arrest Tactics. Pet. App. 74a-77a. Mr. Landers opined that the use of the taser under the totality of the circumstances did not comport with professional standards and was unreasonable. Pet. App. 78a-82a.

At the jury instruction conference, Mr. Kingsley objected to the district court's proposed instructions, which required a showing of subjective intent, and argued that the standard for excessive force claims brought by pretrial detainees should track the Fourth Amendment. Pet. App. 84a-87a. In other words, Mr. Kingsley argued, the correct standard requires only a showing that the force used was unreasonable. *Id.* Based on applicable Seventh Circuit precedent and the Seventh Circuit Pattern Jury Instructions, Mr. Kingsley argued that there was no need to instruct the jury on the defendants' subjective intent, because the jury may determine unreasonableness from objective factors. *Id.* Over Mr. Kingsley's objection, the district court deviated from the pattern jury instructions and required Mr. Kingsley to show that Appellees applied force "recklessly," "recklessly disregarded plaintiff's safety," and acted with "reckless disregard of plaintiff's rights." Pet. App. 8a-9a. With these phrases placed in context, the jury instructions are as follows:

> Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances of the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they *recklessly disregarded plaintiff's safety* by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiff's rights*, you may consider factors such as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.

See Pet. App. 8a-9a (emphases added).

Following deliberations, the jury found for the defendants. The district court entered judgment, and Mr. Kingsley timely appealed.

On appeal to the Seventh Circuit, Mr. Kingsley again argued that under prevailing case law, the applicable standard for excessive force claims brought by a pretrial detainee is whether the conduct is objectively unreasonable. Appellant's Br. 11-16. Mr. Kingsley further argued that to the extent a showing of intent is required, that requirement is met where the conduct is deliberate, as opposed to merely negligent. Appellant's Br. 13. Thus, Mr. Kingsley argued the jury instructions below improperly required him to show subjective elements derived from the Eighth Amendment to prevail on his excessive force claim. Appellant's Br. 18-21.

On March 3, 2014, a divided three-judge panel of the Seventh Circuit affirmed. The majority applied the Due Process Clause of the Fourteenth Amendment in evaluating Mr. Kingsley's excessive force claim because it found a pretrial detainee neither an arrestee (protected from unreasonable seizure by the Fourth Amendment) nor a sentenced prisoner (protected from cruel and unusual punishment by the Eighth Amendment). Rather, a pretrial detainee is entitled to an intermediate level of protection. Pet. App. 11a. Although the panel highlighted that the controlling case in the circuit held that "the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them," the panel nonetheless concluded that the test is not wholly objective. Pet. App. 15a. (quoting *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990)). The panel asserted that the circuit's prior cases "make

clear that, although we employ the objective criteria of the Fourth Amendment as a touchstone by which to measure the gravity of the defendant officer's conduct, we also recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny." Pet. App. 17a-18a.

Judge Hamilton dissented, highlighting the confusion among the pretrial detainee excessive force cases both within the Seventh Circuit and across the country. He criticized the panel majority for introducing a new, additional element into the claim and effectively allowing officers an escape hatch, even when they use objectively unreasonable force. Pet. App. 27a. (asking "[w]hen does the Constitution allow law enforcement and correctional officers to use *objectively unreasonable* force against a person not convicted of a crime?"(emphasis added)).

REASONS FOR GRANTING THE PETITION

I. A DEEP SPLIT DIVIDES THE CIRCUITS ON THE APPLICABLE STANDARD GOVERNING PRETRIAL DETAINEES' EXCESSIVE FORCE CLAIMS.

The courts of appeals are fractured on the elements of an excessive force claim brought by a pretrial detainee under 42 U.S.C. § 1983. Specifically, the courts do not agree as to whether the governing test is purely objective or whether it requires the plaintiff to prove some sort of subjective intent on the part of the offending officers.

Five circuits—the Fourth, Eighth, Ninth, Tenth, and D.C. Circuits—require proof only of objectively unreasonable force; they do not require the pretrial detainee to prove the state actor's subjective intent at

the time of the incident. See *Justice* v. *Dennis*, 793 F.2d 573, 576-78 (4th Cir. 1986) ("The fundamental inquiry in all excessive force cases, regardless of the protected interest's fourth, fifth or eighth amendment origins, is whether the degree of force was necessary to protect a legitimate state interest, and therefore permissible under all the circumstances. . . . Proof of bad motive, evil intent, or 'ulterior purpose' is not required."); *Andrews* v. *Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) ("The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard." (citing *Johnson-El* v. *Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989))); *Gibson* v. *Cnty. of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (holding that an objectively reasonable test applies because "we have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." (quoting *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996))); *Estate of Booker* v. *Gomez*, 745 F.3d 405, 426-27 (10th Cir. 2014) (holding that objective factors demonstrated "excessive zeal behind the use of force" on the plaintiff, the court stated it has never "disposed of a due process excessive force claim solely on the 'motive' factor when disproportionate force and serious injury were present."); *Norris* v. *District of Columbia*, 737 F.2d 1148, 1156 (D.C. Cir. 1984) ("If the degree of force is unreasonable in response to the justification [for the force], the application of the excessive force is unconstitutional.").

Six circuits—the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits—require a pretrial-detainee plaintiff in an excessive force case to show

the defendant's subjective intent to violate the detainee's constitutional rights. And even those that fall on this side of the split cannot agree on what level of subjective intent must be proven; the spectrum ranges from reckless to wanton to malicious to sadistic intent. See *United States* v. *Walsh*, 194 F.3d 37, 49-50 (2d Cir. 1999) ("*Hudson* highlights two conditions, one subjective and the other objective, that must be met in order to establish a constitutional claim in the prison context. . . . [T]he subjective requirement is satisfied if the defendant has a 'sufficiently culpable state of mind,' [*Hudson* v. *McMillian*] 503 U.S. [1,] 8 . . . 'shown by actions characterized by wantonness' . . . ." (quoting *Blyden* v. *Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999))); *Fuentes* v. *Wagner*, 206 F.3d 335, 346 (3d Cir. 2000) ("Fuentes was not entitled to an 'objective reasonableness' instruction."); *Bender* v. *Brumley*, 1 F.3d 271, 278 (5th Cir. 1993) ("In short, when determining what standard applies to excessive force claims brought by pre-trial detainees, the proper due process inquiry . . . . probes the subjective intent of the detaining officers."); *Griffin* v. *Hardrick*, 604 F.3d 949, 954 (6th Cir. 2010) ("[T]he court must determine whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (quoting *Watkins* v. *Evans*, No. 95-4162, 1996 WL 499094, at *2 (6th Cir. Sept. 3, 1996))); *Boxeman* v. *Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) ("Under [the excessive force] standard, 'whether or not a prison guard's application of force is actionable turns on whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.'" (quoting *Brown* v. *Smith*, 813 F.2d 1187, 1188 (11th Cir. 1987))).

Had the incident involving Mr. Kingsley occurred in the Fourth, Eighth, Ninth, Tenth, or D.C. Circuits, the jury would have been instructed on the objective standard contained within Mr. Kingsley's proposed instructions. Those circuits do not condition the success of the plaintiff's claim on whether he can prove the subjective intent of the state actor at the time of the incident. The Seventh Circuit, along with five other circuits, however, significantly increases the burden on the plaintiff by requiring proof of an additional subjective element. The excessive force claims of similarly situated defendants should not hinge on the jurisdiction in which claims are brought. Review is warranted to resolve this split and define the contours of a pretrial detainee's Constitutional protection from excessive force by state actors.

II. THE COURTS OF APPEALS ARE SPLIT ON WHETHER THE STANDARD FOR EXCESSIVE FORCE CLAIMS BROUGHT BY PRETRIAL DETAINEES SHOULD TRACK THE EIGHTH AMENDMENT OR THE FOURTH AMENDMENT.

The split identified above stems from the fact that the circuits likewise cannot agree as to which constitutional right underlies a pretrial detainee's excessive force claim, a question this Court in *Graham* v. *Connor*, 490 U.S. 386 (1989), left open. Specifically, although this Court has held that due process of law requires that a pretrial detainee be free from punishment, *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979), it has "not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins," *Graham*, 490 U.S. at 395 n.10. As this Court recognized, the very starting

point of the "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Id.* at 394. However, circuit courts have begun the analysis from different places, and have produced an amalgam of varying standards based on the protections guaranteed by the Fourth and/or Eighth Amendments.

For example, the Ninth and Eighth Circuits apply a Fourth Amendment-style standard based on due process. *Gibson*, 290 F.3d at 1197 ("[T]he Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." (quoting *Pierce*, 76 F.3d at 1043)); *Andrews*, 253 F.3d at 1060 ("The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard." (citing *Johnson-El*, 878 F.2d at 1048-49)).

The Third, Sixth, and Eleventh Circuits apply a standard akin to the Eighth Amendment. *Fuentes*, 206 F.3d at 347 ("[W]e hold that the Eighth Amendment cruel and unusual punishments standards. . . apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance." (emphasis omitted)); *Griffin*, 604 F.3d at 953 (applying the Eighth Amendment standard, the court held that "[t]he law is unsettled as to whether the analysis for a Fourteenth Amendment excessive-force claim and an Eighth Amendment excessive-force claim is the same."); *Bozeman*, 422 F.3d at 1271 (holding that technically the constitutional standard is the Fourteenth Amendment rather than the Eighth Amendment, "[b]ut it makes no difference whether [plaintiff] was a pretrial detainee or a convicted prisoner because 'the applicable standard is the same.'" (quoting

Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996))).

Perhaps the most confusing standards are those adopted by the Second, Fifth, and Seventh Circuits, where a combination of the Eighth and Fourth Amendments are applied. *Walsh*, 194 F.3d at 49 (holding the Fourteenth Amendment applies, but the standard requires two conditions, "one subjective and the other objective."); *Bender*, 1 F.3d at 278 (holding the Fourteenth Amendment applies, but the standard "probes the subjective intent of the detaining officers."); *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996) ("In this circuit, we have recognized the insufficiency of the Eighth Amendment's protections for pretrial detainees and have held that to prevail on a Fourteenth Amendment claim, a plaintiff must prove that the defendant(s) 'acted deliberately or with callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights.'" (quoting *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988))).

This Court should resolve this threshold inquiry in order to ensure uniformity among the circuits on the question of the elements of excessive force claims by pretrial detainees.

III. THE SEVENTH CIRCUIT'S APPROACH FALLS ON THE WRONG SIDE OF THE SPLIT AND THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION.

The Seventh Circuit wrongly tethers its Fourteenth Amendment excessive force standard to the Eighth Amendment—and asks too much of pretrial detainee plaintiffs by forcing them to establish a subjective intent in addition to objectively unreasonable force. First, unreasonable force is de facto evidence of pun-

ishment for purposes of the Due Process protections of the Fourteenth Amendment. Therefore, the Seventh Circuit's approach runs afoul of this Court's precedent by requiring a plaintiff to prove more. *Bell*, 441 U.S. at 535; see also Pet. App. 27a (Hamilton, J., dissenting) (explaining that, "[i]f a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was 'punished' without due process of law."). And the Seventh Circuit's incorporation of Eighth Amendment subjective language into the standard does not adequately vindicate a pretrial detainee's rights. Indeed, the Court generally disfavors requiring a showing of subjective intent to harm. Cf. *United States* v. *Feola*, 420 U.S. 671, 684 (1975) (holding the government need not prove the specific intent of the accused to harm a federal agent because "[a] contrary conclusion would give insufficient protection to the agent."). In contrast, application of the Fourth Amendment objective standard to pretrial detainees would vindicate these rights, equalize the treatment between those who are able to make bail and those who cannot (and thus are often housed with convicted prisoners), see, *e.g.*, *Shreve* v. *Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681 (6th Cir. 2006), and clearly demarcate the different rights accorded to convicted prisoners and those that have not yet been found guilty beyond a reasonable doubt.

Mr. Kingsley's case is an ideal vehicle for this Court to consider these questions. The officers applied a taser to Mr. Kingsley when he presented no objectively reasonable threat. Had the officers' subjective intent not been placed in issue by the trial court's jury instruction, the jury likely would have found that the officers violated Mr. Kingsley's constitutional rights through their actions. The issue was cleanly pre-

served before trial, after trial and on appeal. The case is not encumbered by procedural anomalies or alternate grounds of decision. And the Seventh Circuit explicitly recognized the split of authority; Judge Hamilton's dissent ably laid bare the difficulties with the panel majority's approach. And because nearly every circuit has weighed in on the question, it is ripe for this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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DEC 4 2014
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No. 14-6368

In the Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether there is a split in the circuit courts regarding a 42 U.S.C. § 1983 excessive force claim brought by a pretrial detainee based solely on the Fourteenth Amendment, where every circuit to specifically address the intent requirement for such a claim is in agreement with the Seventh Circuit below that the subjective intent of the officer, whether shown through direct evidence or objective criteria, must be considered when deciding whether the action taken by the officer amounted to punishment in violation of the Due Process Clause.

PARTIES TO THE PROCEEDINGS

All the parties to the proceedings before the Seventh Circuit are listed in the caption. The proceedings before the district court included the parties in the caption, as well as defendants Lisa Josvai, Patricia Fish, Robert Conroy, and Karl Blanton. None of the Respondents are a corporation.

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CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Pursuant to the Fourteenth Amendment to the United States Constitution: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 1983, codified as 42 U.S.C. § 1983, provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

COUNTER-STATEMENT OF THE CASE

There is no split among the circuits regarding the very narrow constitutional question presented here: whether an officer's subjective intent is a requirement of an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment. This case is not about, and thus is not the appropriate vehicle through which the Court should consider, whether specific constitutional provisions – such as the Fourth and Eighth Amendments – protect pretrial detainees. The only constitutional violation claimed by Petitioner in this case is a Fourteenth Amendment due process violation.

Factual Background and Proceedings Below

Respondents incorporate by reference the recitation of facts in the opinion below. (Petitioner's Appendix ("Pet. App.") 32a-41a.) Respondents further state as follows:

Petitioner was incarcerated as a pretrial detainee in the Monroe County Jail in Sparta, Wisconsin at the time of the events at issue. (Pet. App. 33a.) On May 21, 2010, deputies were forced to transfer Petitioner from his cell to a segregation cell (known in the Monroe County Jail as a "receiving cell") after he repeatedly refused to comply with the deputies' requests that he remove a sheet of yellow legal paper that was covering the light above his bed. (Pet. App. 34a.) In order to complete the transfer, several officers approached Petitioner's cell and ordered him to stand up and to back up to the cell door with his hands behind his back. (Pet. App. 35a.) Petitioner did not comply. (*Id.*) After the deputies ordered Petitioner to stand up yet again, he put his hands behind his back but continued to lie on his bunk. (*Id.*) The officers eventually entered the cell and attempted to handcuff Petitioner, but he resisted by tensing and moving his arms. (*Id.*) After the officers managed to handcuff him, Petitioner refused to stand, so they pulled him to his feet, and ultimately carried him from his cell to the receiving cell. (*Id.*) Once in the receiving cell, Petitioner resisted the deputies' attempts to remove his handcuffs. (*Id.* 35a-36a.)

The deputies initially were trying to remove the handcuffs for Petitioner's own safety, and it is Jail policy not to leave handcuffs on inmates in the receiving

cell. (Record ("R.") 154 at 23-24; R. 155 at 31; R. 158 at 72-73.) When Petitioner continued to struggle with the officers, the officers grew concerned about the potential for harm either to him or to them, and they were equally concerned that Petitioner might escalate the situation and begin actively fighting with them. (R. 154 at 25-26; R. 158 at 71; R. 155 at 37-38 & 74-75.)

The deputies were trained consistent with State of Wisconsin guidelines that the use of a taser is justified to overcome active resistance or the threat thereof. The deputies were also trained that active resistance is presented when a subject physically counteracts an officer's control efforts under circumstances in which the behavior, the environment, or other factors create a risk of bodily harm. (R. 156 at 20-23.)

Under the circumstances, Respondent Stan Hendrickson believed that all other reasonable alternatives had been exhausted, and he instructed Respondent Fritz Degner to apply a contact stun to Petitioner with his taser. Degner applied a five second contact stun to the back of Petitioner's right shoulder. Petitioner continued struggling even after the use of the taser. (R. 155 at 37, 40-42, & 77-78; R. 158 at 73.) John Peters, a national expert in the use of force by law enforcement officers, testified that the use of a taser in contact stun mode under these circumstances was reasonable. (R. 156 at 27-28.)

After the taser had been applied, Lt. Conroy ordered the officers out of the cell. (Pet. App. 36a.) Shortly thereafter, one of the officers re-entered the cell and successfully removed the handcuffs. (*Id.*)

Petitioner eventually sued Respondents, and other officers, claiming he was subjected to the use of excessive force in violation of the Fourteenth Amendment. (Pet. App. 37a, 83a.) Although Petitioner filed the matter *pro se*, counsel was subsequently appointed to represent Petitioner through trial. (Pet. App. 38a.) Only Petitioner's excessive force claim against Respondents went to the jury. (*Id.*) After the jury returned a verdict in favor of Respondents, Petitioner appealed to the Seventh Circuit, claiming the jury instruction was erroneous. (Pet. App. 41a.) He argued, among other things, "that the instruction wrongfully conflated the standard for excessive force claims under the Eighth and Fourteenth Amendments and that, as a result, the instruction incorrectly required him to demonstrate that the defendants acted with reckless disregard for his safety." (*Id.*) Analyzing his claim under the Fourteenth Amendment's Due Process Clause, the Seventh Circuit adhered to its previous cases holding that "the existence of intent—at least recklessness—is a requirement in Fourteenth Amendment excessive force cases," and that the instruction given properly required such a showing, "measured largely by the objective factors . . . ." (Pet. App. 52a-53a.) Petitioner's request for rehearing or rehearing *en banc* was denied. (Pet. App. 81a-82a.)

SUMMARY OF THE ARGUMENT

This is a factually unremarkable case that raises a limited legal issue that is well on its way to being settled by the United States Circuit Courts of Appeals with no need for intervention by this Court. The only basis for review asserted in the petition for a writ of certiorari ("Petition") is a purported split among the circuits

regarding the applicable standard for an excessive force claim brought by a pretrial detainee under 42 U.S.C. § 1983. As this Court has repeatedly instructed, however, Section "1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (citation and internal quotation marks omitted). The only constitutional provision at issue in this case is the Fourteenth Amendment. (Pet. App. 37a, 83a.) Although the Fourth and Eighth Amendments are raised in the Petition, Petitioner did not claim in the proceedings below that his Fourth or Eighth Amendment rights were violated by the Respondents. Rather, his claims were limited solely to the Fourteenth Amendment. (*Id.*) And Petitioner's claims were presented even more narrowly before the Seventh Circuit, raising the limited issues of whether (a) the Fourteenth Amendment requires a showing of the officer's subjective intent to punish a pretrial detainee – be it through direct evidence or objective factors – before liability for excessive force under the Fourteenth Amendment may attach, and (b) whether the district court erred on instructing the jury on the issue of harm, a claim Petitioner has now abandoned *sub silentio*. (Pet. App. 41a.) It is therefore irrelevant, and this is not the case through which the Court should settle, whether the Fourth and Eighth Amendments protect pretrial detainees – issues not presented or developed below. The very limited constitutional issue presented here—and which the

Seventh Circuit answered in the affirmative—is whether an officer's subjective intent is a requisite element of a Section 1983 excessive force claim brought by a pretrial detainee based solely on the Fourteenth Amendment. As that conclusion does not conflict with the opinion of any other circuit court to specifically address that issue, and as no other compelling basis is urged or presented for review by this Court, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE INTENT REQUIREMENT RECOGNIZED BY THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER UNITED STATES COURT OF APPEALS THAT HAS ADDRESSED THIS ISSUE.

As an initial matter, all circuits agree – as they must based on this Court's precedent – "that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395 n.10; *Bell v. Wolfish*, 441 U.S. 520, 535-40 (1979). However, "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Bell*, 441 U.S. at 537. So, true to these teachings, all Circuits when considering an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment inquire whether the action taken by the officer amounted to punishment in violation of the Due Process Clause. *See, e.g., Sawyer v. Asbury*, 537 F. App'x 283, 290 (4th Cir. 2013) ("claims of post-arrest excessive force against an arrestee or pre-trial detainee . . . are governed by the Due Process Clause of the Fourteenth Amendment, which prohibits before conviction 'the use of excessive force that amounts to punishment.'"); *Jackson v. Buckman*, 756 F.3d 1060, 1067 (8th Cir.

2014) ("The Due Process Clause of the Fourteenth Amendment protects pretrial detainees from 'the use of excessive force that amounts to punishment.'"); *Sonntag v. Balaam*, 498 F. App'x 745 (9th Cir. 2012) (same); *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (same); *Estate of Booker v. Gomez*, 745 F.3d 405, 420 (10th Cir. 2014) (same). This is a well settled standard that is not subject to any purported circuit split.

Not surprisingly, what conduct amounts to punishment in the constitutional sense cannot be and has not been strictly defined by this Court or the lower courts. Indeed, this Court has instructed in other contexts that the rules of due process not be mechanically applied:

> The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Cnty. of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (internal quotation marks omitted). Consequently, what constitutes a violation of the Due Process Clause is an inquiry rarely subject to a uniform and precise checklist of factors. The Seventh Circuit therefore applies a case-by-case balancing test that considers the actor's subjective intent, among other factors, to determine whether the state has punished a pretrial detainee in violation of the Due Process Clause. (Pet. App. 43a-53a.) Intent to punish must be shown, be it through direct evidence or objective considerations. (Pet. App. 50a-53a.) Petitioner disagrees, asking this Court to

conclude that an officer's subjective intent is irrelevant and should not be considered. No circuit has adopted this "wholly objective" standard advocated by Petitioner in the context of a due process claim, nor is such a standard supported by the precedent of this Court.

A. A Subjective Intent Requirement for a Due Process Violation Conforms With This Court's Precedent.

This Court has made clear that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Cnty. of Sacramento*, 523 U.S. at 848. Indeed, "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 849. And in the jail context, deliberate or criminally reckless conduct is a necessary predicate to any claim under the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327, 334 (1986). The Seventh Circuit has therefore correctly concluded that for liability to lie under the Due Process Clause, "the official conduct must be at least reckless. Recklessness, which necessarily incorporates some measure of subjective intent, stands in contrast to the rule under the Fourth Amendment that focuses only on whether the government conduct was '*objectively* reasonable' in light of all of the facts and circumstances." (Pet. App. 44a-45a.) As explained below, none of the cases cited by Petitioner reject this proposition.

B. All the Circuits That Have Addressed the Issue Presented Here Consider the Actor's Subjective Intent to Punish a Pretrial Detainee When Analyzing a Due Process Excessive Force Claim.

Petitioner readily acknowledges that a majority of the circuits to address this issue "require a pretrial detainee plaintiff in an excessive force case to show the defendant's subjective intent to violate the detainee's constitutional rights." (Pet. App. 24a-25a.) While Petitioner argues that the Fourth, Eighth, Ninth, Tenth, and D.C. Circuits have adopted a wholly objective standard for a due process excessive force claim, thus creating a split among the circuits, on close review none of the cases cited by Petitioner support such a conclusion. Indeed, all the cases cited are easily reconcilable or simply misapplied by Petitioner.

The first opinion cited by Petitioner, *Justice v. Dennis*, 793 F.2d 573 (4th Cir. 1986), has been vacated: first, by the Fourth Circuit when it granted rehearing and issued a new opinion, which notably omitted the very language quoted by Petitioner. *Justice v. Dennis*, 834 F.2d 380 (4th Cir. 1987) (opinion on rehearing); *see also* Fourth Circuit Loc. R. 35(c) ("Granting of rehearing en banc vacates the previous panel judgment and opinion"); and second, by this Court when it granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Graham*. *Justice v. Dennis*, 490 U.S. 1087 (1989). No subsequent opinion was published. (*See generally Justice v. Dennis*, Court of Appeals Docket No. 85-1431.) In any event, recent cases from the Fourth Circuit—none of which are addressed by Petitioner—make clear that an officer's subjective intent is a consideration. *See, e.g, McMillian v. Wake Cnty. Sheriff's Dep't*, 399 F. App'x 824, 827-28 (4th Cir. 2010) ("Excessive force claims of arrestees and pretrial detainees

are governed by the Due Process Clause of the Fourteenth Amendment. In analyzing such a claim, '[t]he proper inquiry is whether the force applied was in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" (citations omitted)); *Sawyer*, 537 F. App'x at 290 (same); *Young v. Prince George's Cnty.*, 355 F.3d 751, 758 (4th Cir. 2004) (distinguishing Fourth Amendment's "objective reasonableness" standard from "subjective standard used to adjudicate excessive force claims brought under the Due Process Clause of the Fourteenth Amendment"); *Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir. 1999), *cert. denied*, *Grayson v. Royer*, 529 U.S. 1067 (2000) (appellant's excessive force claim failed because "[t]he force applied by [the] officers was '"in a good faith effort to maintain or restore discipline,"' and thus not violative of the Due Process Clause of the Fourteenth Amendment"); *United States v. Cobb*, 905 F.2d 784, 789 (4th Cir. 1990) (finding of punitive intent required).

A similar good faith standard has been recognized by the Eighth Circuit:

> The guidelines for evaluating whether excessive force has been used are clearly set forth in this circuit . . . In determining whether the constitutional line has been crossed, a court must look to such factors as . . . whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Dale v. Janklow, 828 F.2d 481, 484 (8th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988). Similar to the Seventh Circuit, a jury in the Eighth Circuit is allowed to determine whether the defendant's conduct amounted to "punishment on the basis of direct evidence of intent to punish, or it [can, based on objective factors,] infer that the purpose was punishment from the fact that the condition either bore no

reasonable relation to a legitimate goal or exceeded what was necessary for attaining such a goal." *Putman v. Gerloff*, 639 F.2d 415, 420 (8th Cir. 1981).

Petitioner ignores this authority and relies on *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001) (citing *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989)), both of which are readily distinguishable, to argue that the Eighth Circuit applies a wholly objective standard to due process claims. *Johnson-El*, upon which *Andrews* is based, is a conditions of confinement case: "Their ***confinement conditions*** are analyzed under the due process clause of the Fifth and Fourteenth Amendments . . . ." *Johnson-El*, 878 F.2d at 1048 (emphasis added). Additionally, *Andrews* involved a constitutional claim brought by an involuntarily committed state hospital patient, not a pretrial detainee. 253 F.3d at 1060. In deciding that claim, the Court enumerated some of the factors that may be considered when analyzing an excessive force claim (253 F.3d at 1060 n.7), but the court did not state that the factors enumerated therein were exhaustive. Nowhere in that opinion did the court disagree with *Putman* or *Dale, supra*, or state that the actor's good faith can never be considered. That was simply not an issue in *Johnson-El* or *Andrews*. On close review, neither of those opinions address whether, let alone stand for the blanket proposition that, a defendant's subjective intent can never be considered in analyzing an excessive force claim based solely on the Fourteenth Amendment. At best, that issue remains unsettled within the Eighth Circuit, and any discrepancies within that circuit are not for this Court to resolve (and certainly not through a case such as this one that does not even originate from that circuit). Furthermore,

resolution of any intra-circuit split by this Court, even if deemed appropriate, would be premature for two reasons. First, unlike the Seventh Circuit, the Eighth Circuit is yet to conclusively resolve the threshold question of whether the Fourth Amendment protects pretrial detainees. *See, e.g, Andrews*, 253 F.3d at 1060-61 ("we have not drawn a bright line dividing the end of the arrestee's status and the beginning of the pre-trial detainee's status"). Second, in due time, the Eighth Circuit may very likely side with the Seventh Circuit. In fact, the Eighth Circuit recently stated in June of this year, that "conduct that is merely negligent or grossly negligent does not implicate the protections of the Due Process Clause," implying the intent requirement, and while the Court went on to say that "[t]he objective indicia relevant to the excessive-force analysis under the Fourth Amendment guide this due-process inquiry," it cited the Seventh Circuit's opinion in this case, in addition to *Andrews*. *Jackson*, 756 F.3d at 1067. While it is simply too early to tell if the Eighth Circuit will ultimately draw the conclusion urged by Petitioner in this case, the citation to the opinion below indicates otherwise. Either way, Petitioner has not cited a single Eighth Circuit case in which the court squarely addressed the question of punitive intent and held that the official's subjective intent is irrelevant for purposes of a due process analysis.

The same holds true for the Ninth, Tenth, and D.C. Circuits. As stated in the Ninth Circuit case cited by Petitioner, *Gibson v. County of Washoe*, that court has determined that the *Fourth* Amendment protects pretrial detainees. 290 F.3d 1175. Contrary to Petitioner's suggestion, however, the Fourth Amendment and its

objective standard does not apply to *all* pretrial claims in the Ninth Circuit. *See, e.g, Wilson v. Pima Cnty. Jail*, 256 F. App'x 949, 950 (9th Cir. 2007) (whether the Fourth or Eighth Amendment standard applies to post-arraignment pretrial detainees is "an open question in this circuit"). To the contrary, the Ninth Circuit has recently held that "[a]fter arraignment, the Due Process Clause of the Fourteenth Amendment protects a detainee from excessive force amounting to punishment," and that "[a] pretrial post-arraignment detainee's rights under the Fourteenth Amendment are comparable to a prisoner's rights under the Eighth Amendment, so, post-arraignment, the . . . 'malicious and sadistic' standard applies." *Young v. Wolfe*, 478 F. App'x 354, 356 (9th Cir. 2012). Given these two standards, it simply cannot be said that the decision of the Seventh Circuit in this case defining only the *due process* rights of a pretrial detainee and in which no Fourth Amendment claim is raised is in conflict with the Ninth Circuit. It is not. Rather, the Fourth Amendment cases relied on by Petitioner are wholly inapposite.

As for the Tenth Circuit, even the single case Petitioner cites as allegedly conflicting with this one, *Estate of Booker v. Gomez*, makes clear that "although an excessive force claim brought under the Fourth Amendment depends on the objective reasonableness of the defendants' actions, the same claim brought under the Fourteenth Amendment turns on additional factors, including '***the motives of the state actor***.'" 745 F.3d at 419 (emphasis added). The court then went on to address whether the plaintiff had demonstrated the "requisite subjective intent." *Id.* at 426. Nowhere in that opinion did the Tenth Circuit hold that a defendant's

subjective intent need not be established. That is simply not the law in that circuit. *See, e.g., Smith v. Iron Cnty.*, 692 F.2d 685, 687 (10th Cir. 1982) (considering as part of due process analysis "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm"); *Porro v. Barnes*, 624 F.3d 1322, 1327 (10th Cir. 2010) ("In our due process precedent we have said that we examine the force used, the injury inflicted, and relevant motives. But in each instance, the focus must always be on the *defendant*—on the force *he* used or caused to be used, on the injury *he* inflicted or caused to be inflicted, and on *his* motives. This is because § 1983 isn't a strict liability offense.").

Finally, Petitioner cites a 1984 case by the D.C. Circuit in which the actor's intent was not at issue to argue for a wholly objective standard. In that case, *Norris v. D.C.*, 737 F.2d 1148 (D.C. Cir. 1984), the lower court granted summary judgment based on its conclusion that because the plaintiff did not suffer permanent injuries his claims did not give rise to a constitutional violation. *Id.* at 1148. In deciding to reverse that decision, the D.C. Circuit accepted the plaintiff's allegations "that four correctional officers, without cause and for malicious purposes, maced, beat, and kicked him . . . ." *Id.* at 1152. Intent was simply not an issue. The court nonetheless indicated that the officer's intent is a consideration. Quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973), the D.C. Circuit stated that one of the factors to be considered when determining whether an officer has violated due process is "'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the

very purpose of causing harm.'" *Norris*, 737 F.2d at 1150. Nowhere in that opinion did the D.C. Circuit state that the officer's subjective intent is irrelevant.

At bottom, Petitioner has not cited a single case in the Fourth, Eighth, Ninth, Tenth, or D.C. Circuits in which one of those courts squarely addressed the issue of the intent required for an excessive force claim under the Due Process Clause and concluded, contrary to the Seventh Circuit, that the officer's subjective intent need not be established, be it through direct evidence or objective considerations.

Indeed, all the circuits that have specifically addressed this issue or even come close to addressing it, appear to agree with the Seventh Circuit that the officer's subjective intent must be considered when determining punitive conduct for purposes of a due process claim, albeit they do not all use the exact same terminology. *See, e.g., United States v. Walsh*, 194 F.3d 37, 48-49 (2nd Cir. 1999) ("'whenever prison officials stand accused of using excessive physical force in violation of the [Constitution], the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm'"); *Murray v. Johnson No. 260*, 367 F. App'x 196, 198 (2nd Cir. 2010) ("The subjective condition [for a due process claim] is satisfied by showing that the defendant had a 'sufficiently culpable state of mind'-the core inquiry being 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'"); *Fuentes v. Wagner*, 206 F.3d 335, 344 (3rd Cir. 2000), *cert. denied*, 531 U.S. 821 (2000) (applying malicious and sadistic standard); *Valencia v. Wiggins*, 981 F.2d 1440, 1446-47 (5th Cir. 1993)

(same); *Shreve v. Franklin Cnty.*, 743 F.3d 126, 134, 137 (6th Cir. 2014) ("Generally, to constitute a Fourteenth Amendment violation, an official's conduct must 'shock [ ] the conscience,'" which is a "more difficult" standard for a plaintiff to meet than the objectively unreasonable test); *Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001) (Fourteenth Amendment standard is "[a] substantially higher hurdle . . . than . . . 'objective reasonableness' test"); *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002) ("In order to establish a constitutional violation . . . Appellant must demonstrate that the state acted with the requisite culpability to establish a substantive due process violation under the Fourteenth Amendment. . . . At a minimum, the [shocks the conscience] standard requires a showing beyond mere negligence.") (citations omitted); *Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) (applying malicious and sadistic standard). As Petitioner has not shown and cannot show that the Seventh Circuit's opinion below on the limited issue of intent conflicts with the opinion of any other circuit to squarely address that issue, review by this Court is unwarranted.

II. ANY PERCEIVED CONFLICT WILL LIKELY BE CORRECTED WITHOUT THIS COURT'S INTERVENTION.

The parameters of a pretrial detainee's constitutional rights are still being shaped in the different circuits, as is the standard applicable to claims – such as the one here – analyzed solely under the Due Process Clause. With the majority of the circuits already concluding that the officer's subjective intent is a required element of a due process claim, whether shown through direct evidence or objective considerations, in due time the circuits yet to resolve this issue may very well side

with the majority obviating the need for any intervention by this Court. While Petitioner claims that nearly every circuit has weighed in on the question presented here, the truth of the matter is that even Petitioner's own cited authorities do not support that conclusion. (*See supra*, pp. 9-16.) To be clear, the question in this appeal is not whether the Fourth, Eighth, or some other specific constitutional provision protects pretrial detainees as portrayed by Petitioner. The limited question argued and preserved by Petitioner here is simply whether the officer's subjective intent is a requisite element of a due process excessive force claim where no other specific constitutional provision is asserted. As *that* question is still being resolved by the circuits, intervention by this Court is unnecessary.[1]

III. THE ABSENCE OF A CLAIM UNDER A SPECIFIC CONSTITUTIONAL PROVISION MAKES THIS AN INAPPROPRIATE CASE FOR REVIEW.

The Court's jurisprudence instructs that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). This Court is yet to decide—and has rejected previous opportunities to decide—whether a specific constitutional provision, such as the Fourth Amendment, protects a pretrial detainee from the use of excessive force. *See, e.g., Valencia*, 981 F.2d 1440 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993)

[1] Incidentally, even if the Court were inclined to adopt an intent requirement different from that of the majority of the circuits, Petitioner in this case would not obtain a new trial because Respondents would be entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

(rejecting defendant's claim that Fourth Amendment applies); *Fuentes*, 206 F.3d at 347 (3rd Cir.) (holding that pretrial detainee not entitled to Fourth Amendment "objective reasonableness" instruction), *cert. denied*, 531 U.S. 821 (2000); *Robles v. Prince George's Cnty.*, 302 F.3d 262, 269 (4th Cir.) (holding that Fourth Amendment did not protect pretrial detainee), *cert. denied*, 538 U.S. 945 (2003); *Lewis v. Downey*, 581 F.3d 467 (7th Cir.) (rejecting plaintiff's claim that Eighth Amendment applied), *cert. denied*, 59 U.S. 1008 (2010); *Gibson*, 290 F.3d at 1197 (9th Cir.) ("Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention"), *cert. denied*, 537 U.S. 1106 (2003). As that issue was not presented or developed below, this is not the case through which the Court should decide this important question. Nor does the Court's precedent allow the Court to start defining the rights of pretrial detainees under the rubric of substantive due process having refused to settle whether any specific constitutional provisions protect pretrial detainees. Indeed, such drastic action is not warranted here, for, as detailed above, there is no disagreement among the circuits – nor can there be based on this Court's precedent – regarding the requisite intent requirement for excessive force claims based solely on the Fourteenth Amendment – the only claim presented here.

CONCLUSION

True to this Court's precedent on due process claims, the Seventh Circuit correctly concluded that the Fourteenth Amendment requires a showing of the officer's subjective intent to punish a pretrial detainee – be it through direct

evidence or objective factors – before liability for an excessive force under the Fourteenth Amendment may lie. As this conclusion does not conflict with the decision of any other circuit on this specific issue, and no other basis is asserted for review, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Dated: December 4, 2014

Respectfully Submitted,

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No. 14-6368

In the Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2014, I served a copy of the enclosed RESPONDENTS' BRIEF IN OPPOSITION on all counsel of record by electronic mail and by depositing an envelope containing a copy of the brief in the United States mail properly addressed to each of them and with postage prepaid. The names and addresses of those served are as follows:

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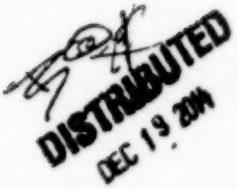

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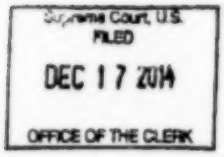

No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF PETITIONER

Respondents' opposition relies on an improper attempt to recast the question presented, yet respondents cannot explain away the clear split between the Seventh Circuit and decisions from the Eighth, Ninth, Tenth, and D.C. Circuits, and cannot simply rewrite the question presented to avoid it. This conflict—which springs from fundamental disagreements about the constitutional sources underlying excessive force claims by pretrial detainees—will not resolve itself. This Court should grant the petition, end decades of disagreement, and decide what constitutional standards govern pretrial detainees' excessive force claims.

I. RESPONDENTS MISAPPREHEND THE QUESTION PRESENTED.

Respondents rewrite the question presented in an attempt to neutralize the conflict among the circuits. The issue as petitioner presented it here and in the Seventh Circuit below is the one this Court should decide; namely, "[w]hether the requirements of a[n] . . . excessive force claim brought by . . . a pretrial detainee . . . are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable." Pet. i; see also Br. Appellant 2 ("Whether the jury was improperly instructed regarding the standard for excessive force that applies to Mr. Kingsley's claim . . . .").

Engaging in classic question begging, respondents assume the truth of their premise that Fourth Amendment principles cannot inform the excessive force test under the due process clause of the Fourteenth Amendment. Thus moving past the heart

of the argument, they conclude that "[t]he only constitutional provision at issue in this case is the Fourteenth Amendment." Br. Opp'n 5. Respondents do not grapple with the fact that at least one circuit—the Ninth—has already held that the Fourth Amendment's objective standard is useful in determining whether actions by government actors constitute excessive force violations of the due process clause of the Fourteenth Amendment. *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002). That one of the circuits in the split has relied on the Fourth Amendment standard means that it cannot be assumed away.

Respondents additionally gloss over the fact that this case is not about just *any* § 1983 claim made by pretrial detainees, but instead focuses solely on excessive force claims, and the proper constitutional standard for evaluating them. As demonstrated by the Ninth Circuit's decision to apply the Fourth Amendment standards to excessive force claims, *id.*, the constitutional underpinnings of § 1983 excessive force claims plainly differ from other kinds of § 1983 claims. Respondents' attempt to recast the question in reliance on non-excessive force cases only serves to muddle the issues and not to "narrow" them as respondents contend. Br. Opp'n 1.

II. THE FEDERAL COURTS OF APPEALS ARE SPLIT ON THE PROPER STANDARD FOR EXCESSIVE FORCE CLAIMS.

Respondents try to explain away the split, but fail. The Seventh Circuit majority below held that a plaintiff must prove two separate elements in order to succeed on an excessive force claim, and one of those elements is a showing of a subjective intent. Pet. App. 17a-18a. The Seventh Circuit's requirement

of subjective intent conflicts with binding[1] Ninth Circuit precedent, which provides a wholly objective test, and with D.C., Eighth, and Tenth Circuit precedent, which view intent as a relevant factor, but do not *require* a subjective intent element.

Specifically, the Ninth Circuit has explained that the excessive force analysis is an objective one to be conducted from "the viewpoint of the reasonable officer," *Gibson*, 290 F.3d at 1197, which leaves no room for an intent requirement or for an inquiry into the offending officer's subjective state of mind:

> The Due Process clause protects pretrial detainees from the use of excessive force that amounts to punishment. Although the Supreme Court has not expressly decided whether the Fourth Amendment's prohibition on unreasonable searches and seizures continues to protect individuals during pretrial detention, we have determined that the Fourth Amendment sets the "applicable constitutional limitations" for considering claims of excessive force during pretrial detention. [The Fourth Amendment case law] therefore explicates the standards applicable to a pretrial detention excessive force

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[1] Respondents resort to citing two unpublished, non-precedential Ninth Circuit cases in an attempt to distract the Court from the state of the law in the Ninth Circuit. These cases cannot eliminate the circuit split for two reasons. First, neither case involve excessive force claims, but instead relate to other types of § 1983 claims. Second, under the Ninth Circuit's rules, "[u]npublished dispositions and orders of this court are not precedent." 9th Cir. R. 36-3(a).

claim in this circuit.[3]

Id. (citations omitted) (quoting *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996)). Therefore, respondents are flatly wrong when they claim that "All the [c]ircuits" consider subjective intent and that "No circuit" has adopted a wholly objective standard. Br. Opp'n 8-9.

Apart from the Ninth Circuit, the panel opinion below also conflicts with other circuits that look to subjective intent as a factor, but not a necessary element of a § 1983 excessive force claim, as it is in the Seventh Circuit. The D.C., Eighth, and Tenth Circuits allow intent to be considered as a factor, but do not require a subjective intent requirement. See *Norris* v. *District of Columbia*, 737 F.2d 1148, 1150 (D.C. Cir. 1984); *Andrews* v. *Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001); *Estate of Booker* v. *Gomez*, 745 F.3d 405, 419 (10th Cir. 2014).

The D.C. Circuit, in *Norris*, endorsed a "shocks the conscience" judicial test to determine whether the force at issue is unconstitutionally excessive. 737 F.2d at 1150. Contrary to respondents' argument, however, the *Norris* court did not require a "subjective intent" element. The court's analysis focused on the relationship between the need for force, and the amount of force used, *i.e.*, an objective test, in order to determine whether the force was

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[3] There is no indication in *Gibson* that there is a distinction between different types of pretrial detainees. In fact, there does not seem to be any defensible reason why Fourth Amendment protections would stop applying to a pretrial detainee if they apply at all after arrest. If the touchstone is the fact that the prisoner has not been convicted of a crime and therefore cannot be punished, then that fact does not change even after arraignment.

applied in "good faith" or otherwise. *Id.* And in fact, the court analyzed the excessive force claim in that case based solely on the conduct of the officers without regard to their subjective intent. *Id.* at 1151-52.

The Eighth Circuit likewise allows intent to be considered, but it does not require proof of subjective intent. As with *Norris*, one factor courts consider in the Eighth Circuit is whether the officers were acting in good faith. *Dale* v. *Jamklow*, 828 F.2d 481, 487 (8th Cir. 1987); *Putman* v. *Gerloff*, 639 F.2d 415 (8th Cir. 1981). But as a case discussed by respondents concludes: the analysis must focus on "whether the officers were *objectively* acting in good faith under the circumstances." *Dale*, 828 F.2d at 487 (emphasis added). Thus, nothing in these opinions conflicts with the Eighth Circuit's pronouncement in *Andrews* v. *Neer*: "The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an *objective* reasonableness standard." 253 F.3d at 1060 (emphasis added).

Similarly, in the Tenth Circuit, intent can be a factor considered in excessive force analysis, as recognized by respondents. Br. Opp'n 14 ("*Smith v. Iron Cnty.*, 692 F.2d 685, 687 (10th Cir. 1982) (considering as part of due process analysis 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm'); *Porro v. Barnes*, 624 F.3d 1322, 1327 (10th Cir. 2010) ('In our due process precedent we have said that we examine the force used, the injury inflicted, and relevant motives . . .')."). How that fits within the broader excessive force framework, however, is established by

Estate of Booker v. *Gomez*, 745 F.3d at 419. There the Tenth Circuit stated: "an excessive force claim brought under the Fourth Amendment depends on the *objective* reasonableness of the defendants' actions, the same claim brought under the Fourteenth Amendment turns on additional factors, including 'the motives of the state actor.'" *Id.* (emphasis added) (quoting *Porro*, 624 F.3d at 1325-26). These cases do not hold that a plaintiff must adduce evidence of intent and prove that intent by a preponderance in order to establish an excessive force claim, only that motive can be considered as a factor within an objective framework.

To be sure, respondents have been able to find Fourth Circuit case law, which petitioner had not found, indicating that the test in that Circuit may not be a wholly objective one for excessive force claims. See *Young* v. *Prince George's Cnty.*, 355 F.3d 751, 758 (4th Cir. 2004). But that one oversight by petitioner does not eliminate the split of authority here. Nor does it explain the fact that the existing split of authority has been expressly noted by several courts including the Sixth Circuit in *Aldini* v. *Johnson*, 609 F.3d 858, 865 (6th Cir. 2010), and the dissent below, Pet. App. 29a. Respondents cannot escape the reality that the majority opinion below conflicts with decisions from the Eighth, Ninth, Tenth, and D.C. Circuits.

Finally, respondents' assertion that the split among the federal courts of appeals will simply resolve itself is unsupported and nothing more than mere speculation. If anything, without guidance from this Court, the chasm between the circuits is more likely to widen and deepen. For example, even among the circuits that require a showing of subjective intent, there is disagreement as to the level of intent that

must be established. Pet. 10. Some circuits require mere recklessness. Pet. App. 21a-22a. Others require a showing of sadistic or malicious purpose. *Griffin* v. *Hardrick*, 604 F.3d 949, 954 (6th Cir. 2010). This fractured case law reveals a deep disagreement about which constitutional protections adhere to the pretrial detainee, and the varying approaches are not reconcilable. The decisions of the courts of appeals will continue to be fractured until this Court decides the issue.

III. THE CONSTITUTIONAL ANALYSIS IN PRETRIAL DETAINEE CASES IS NOT LIMITED TO THE FOURTEENTH AMENDMENT.

The question of which constitutional protections apply to a pretrial detainee are both explicit and implicit in the questions presented to the Seventh Circuit and to this Court. Supreme Court Rule 14(1)(a) allows the court to reach all issues "fairly included" in the question presented. Mr. Kingsley has repeatedly argued that the objective unreasonableness test for his claim of excessive force tracks the Fourth Amendment test, and does not require a showing of subjective intent as in Eighth Amendment jurisprudence. Implicit in petitioner's claim is the proposition that a pretrial detainee is afforded greater constitutional protections than are granted to convicted prisoners. Whether that greater protection is afforded by the Fourth Amendment, the Fourteenth Amendment, or some combination of the two is for this Court to decide now that the federal courts of appeals have come to different decisions on the issue. See Sup. Ct. R. 10(a).

Even if deciding whether the Fourth Amendment applies to pretrial detainees independently of the Fourteenth Amendment is not implicit within the

question presented, the lower court passed on the issue. As this Court stated in *Lebron v. National Railroad Passenger Corp.*, "even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'" 513 U.S. 374, 379 (1995) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)).

Both the majority and dissent below discussed the Fourth, Eighth, and Fourteenth Amendments. The majority recognized that the Fourth Amendment standard requires a determination of whether the conduct of the government official was "objectively reasonable." Pet. App. 13a-14a (emphasis omitted). The majority specifically rejected the wholly objective test based on the Fourth Amendment, Pet. App. 15a-16a, and instead held that at least recklessness must be shown to establish a violation of the Fourteenth Amendment in excessive force cases, Pet. App. 21a. In rejecting the need to establish recklessness, the dissent also discussed the Fourth, Eighth, and Fourteenth Amendments, Pet. App. 28a-31a, in arguing that proving recklessness should not be required, Pet. App. 40a-41a.

As evidenced by these discussions, the Seventh Circuit certainly passed on the question left open by this Court in *Graham v. Connor*, 490 U.S. 386 (1989), of whether the Fourth Amendment applies to pretrial detainees. The Seventh Circuit majority answered that question with a definitive "no" by creating a Fourteenth Amendment standard that requires a subjective inquiry that is not required by the Fourth Amendment. This Court is empowered to determine whether that determination is correct. *Williams*, 504 U.S. at 41.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

No. 14-6368

Michael B. Kingsley,

Petitioner,

v.

Stan Hendrickson and Fritz Degner,

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I, Jeffrey T. Green, do hereby certify that, on this seventeenth day of December, 2014, I caused one copy of the Reply Brief of Petitioner in the foregoing case to be served electronically and by first class mail, postage prepaid, on the following parties:

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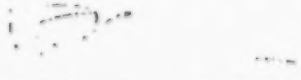

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RULE 33.1(h) CERTIFICATE OF COMPLIANCE

No. 14-6368

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As required by Supreme Court Rule 33.1(h), I, Jeffrey T. Green, certify that the Reply Brief of Petitioner in the foregoing case contains 2,177 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 17, 2014.

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Dear Sir:

Please find enclosed for filing the original plus ten copies of the Reply Brief of Petitioner in the above-captioned case.

If any questions in regard to this filing should arise, please do not hesitate to contact me at the number listed above.

Sincerely,

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Legal Assistant

Supreme Court, U.S.
FILED
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No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,
Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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CERTIORARI GRANTED: JAN. 16, 2015

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN (MADISON)

Docket No. 3:10-cv-00832-bbc

MICHAEL KINGSLEY,

v.

STAN HENDRICKSON, ET AL.,

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/28/2010	1	COMPLAINT against Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen filed by Michael B. Kingsley. (Case randomly assigned to District Judge Barbara B. Crabb.) (Attachments: #1 Cover Letter, # 2 Envelope) (jef) (Entered: 12/28/2010)
12/28/2010	2	Motion for Leave to Proceed in forma pauperis by Plaintiff Michael B. Kingsley. (Attachments: # 1 Envelope) (jef),(ps) (Entered: 12/28/2010)

DATE	NO.	PROCEEDINGS
	* * * *	
01/31/2011	6	ORDER on Leave to Proceed: Plaintiff granted leave to proceed against Defendants Stan Hendrickson, Karl Blanton, Patricia Fish, Lisa Josvai, Fritz Degner, Robert Conroy. Leave to proceed denied and case dismissed against Dennis Pedersen. Materials delivered to USMS for service. Signed by District Judge Barbara B. Crabb on 1/31/2011. (jef),(ps) (Entered: 01/31/2011)
	* * * *	
02/01/2011		Summons Issued as to Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai. Delivered to USMS for service. (jef),(ps) (Entered: 02/01/2011)
02/11/2011	8	Marshal Service Return Executed. Lisa Josvai served on 2/8/2011; Patricia Fish served on 2/8/2011; Robert Conroy served on 2/8/2011; Stan Hendrickson served on 2/8/2011; Fritz Degner served on 2/8/2011; Karl Blanton served on 2/8/2011. (Attachments: # 1 USMS service form as to Patricia Fish,

DATE	NO.	PROCEEDINGS
		# 2 USMS service form as to Robert Conroy, # 3 USMS service form as to Stan Hendrickson, # 4 USMS service form as to Fritz Degner, # 5 USMS service form as to Karl Blanton) (jef),(ps) Modified on 2/15/2011 (elc). (Entered: 02/15/2011)
02/25/2011	9	ANSWER by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai. (Attachments: # 1 Certificate of Service) (Jones, Andrew),(ps) (Entered: 02/25/2011)
	* * * *	
04/21/2011	10	Pretrial Conference Order-Dispositive Motions for Failure to Exhaust Administrative Remedies due 6/3/2011. Dispositive Motions due 10/31/2011. Final Pretrial Submissions/Disclosures and Motions in Limine due 3/9/2012. Responses due 3/23/2012. Final Pretrial Conference set for 4/9/2012 at 08:30 AM. Jury Selection and Trial set for

DATE	NO.	PROCEEDINGS
		4/9/2012 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 4/20/2011. (jef),(ps) (Entered: 04/21/2011)
	*	* * *
05/17/2011	14	Motion to Appoint Counsel by Plaintiff Michael B. Kingsley. (Attachments: # 1 Cover Letter and Envelope) (elc),(ps) (Entered: 05/17/2011)
05/17/2011	15	Brief in Support of 14 Motion to Appoint Counsel by Plaintiff Michael B. Kingsley (elc),(ps) (Entered: 05/17/2011)
05/17/2011	16	Declaration of Michael B. Kingsley re: 14 Motion to Appoint Counsel (Attachments: # 1 Attorney Rejection Letters) (elc),(ps) (Entered: 05/17/2011)
05/23/2011	17	ORDER denying 14 Motion to Appoint Counsel without prejudice. Signed by Magistrate Judge Stephen L. Crocker on 5/23/11. (elc),(ps) (Entered: 05/23/2011)
	*	* * *
07/14/2011	21	MOTION FOR PARTIAL SUMMARY JUDGMENT by Plaintiff Michael B. Kingsley. (Attachments:

DATE	NO.	PROCEEDINGS
		# 1 Cover Letter,
		# 2 Certificate of Service,
		# 3 Envelope) (jaf),(ps) (Entered: 07/14/2011)
07/14/2011	22	Declaration of Michael B. Kingsley filed by Plaintiff Michael B. Kingsley re: 21 Motion for Partial Summary Judgment (jaf),(ps) (Entered: 07/14/2011)
07/14/2011	23	Proposed Findings of Fact filed by Plaintiff Michael B. Kingsley re: 21 Motion for Partial Summary Judgment filed by Michael B. Kingsley (jaf),(ps) (Entered: 07/14/2011)
07/14/2011	24	Brief in Support of 21 Motion for Partial Summary Judgment by Plaintiff Michael B. Kingsley (jaf),(ps) (Entered: 07/14/2011)
07/14/2011	25	Declaration of Michael B. Kingsley re: Exhibits filed by Plaintiff Michael B. Kingsley re: 21 Motion for Partial Summary Judgment (Attachments:
		# 1 Exhibit 1-Inmate Major Violation Report,
		# 2 Exhibit 2-Major Discipline Appeal,

DATE	NO.	PROCEEDINGS
		# 3 Exhibit 3-Directives/ Procedures/Orders) (jaf),(ps) (Entered: 07/14/2011)
07/14/2011		Set Deadlines as to 21 MOTION FOR PARTIAL SUMMARY JUDGMENT. [Pro Se Summary Judgment Procedure for Cases Assigned to Judge Crabb attached.] Defendants' Brief in Opposition due 8/15/2011. Plaintiff's Brief in Reply due 8/25/2011. (elc),(ps) (Entered: 07/14/2011)
08/15/2011	26	Cross MOTION FOR SUMMARY JUDGMENT by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai. (Posnanski, Timothy),(ps) (Entered: 08/15/2011)
08/15/2011	27	Proposed Findings of Fact filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 21 Motion for Partial Summary Judgment filed by Michael B. Kingsley, 26 Motion for Summary Judgment filed by Karl Blanton, Stan Hendrickson, Fritz Degner, Patricia Fish, Lisa Josvai,

DATE	NO.	PROCEEDINGS
		Robert Conroy (Posnanski, Timothy),(ps) (Entered: 08/15/2011)
08/15/2011	28	Brief in Opposition by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 21 MOTION FOR PARTIAL SUMMARY JUDGMENT filed by Michael B. Kingsley *and in Support of 26 Defendants' Cross-Motion for Summary Judgment* (Posnanski, Timothy),(ps) Modified docket relationship on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	29	Response to Proposed Findings of Fact filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 21 MOTION FOR PARTIAL SUMMARY JUDGMENT *and in Support of 26 Defendants' Cross-Motion for Partial Summary Judgment* (Posnanski, Timothy), (ps) Modified docket relationship on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	30	Declaration of Lisa Josvai filed by Defendant Lisa Josvai re: 26

DATE	NO.	PROCEEDINGS
		Motion for Summary Judgment (Attachments: # 1 Exhibit A-Monroe County Sheriff Prisoner Control Record, # 2 Exhibit B-Major Discipline Appeal) (Posnanski, Timothy),(ps) Modified exhibit descriptions on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	31	Declaration of Timothy H. Posnanski filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit 1-Excerpts of Kingsley depo., # 2 Exhibit 2-Copies of unpublished sources) (Posnanski, Timothy),(ps) Modified exhibit descriptions on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	32	Declaration of Karl Blanton filed by Defendant Karl Blanton re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on

DATE	NO.	PROCEEDINGS
		8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	33	Declaration of Robert Conroy filed by Defendant Robert Conroy re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	34	Declaration of Nicholas Manka filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	35	Declaration of Patricia Fish filed by Defendant Patricia Fish re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Monroe Co. Jail Inmate Major Violation Report) (Posnanski, Timothy),(ps) Modified exhibit description on

DATE	NO.	PROCEEDINGS
		8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	36	Declaration of Stan Hendrickson filed by Defendant Stan Hendrickson re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	37	Declaration of Fritz Degner filed by Defendant Fritz Degner re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	38	Declaration of Jeffrey Leis filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 26 Motion for Summary Judgment (Posnanski, Timothy),(ps) (Entered: 08/15/2011)

* * * *

DATE	NO.	PROCEEDINGS
08/16/2011		Set Deadlines as to 26 Cross MOTION FOR SUMMARY JUDGMENT. [Pro Se Summary Judgment Procedure for Cases Assigned to Judge Crabb attached.] Plaintiff's Brief in Opposition due 9/15/2011. Defendants' Brief in Reply due 9/26/2011. (elc),(ps) (Entered: 08/16/2011)
09/20/2011	40	Brief in Opposition by Plaintiff Michael B. Kingsley re: 26 Motion for Summary Judgment filed defendants. (Attachments: # 1 Certificate of Service, # 2 Cover Letter, # 3 Envelope) (jef),(ps) (Main Document 40 replaced on 9/20/2011) (jef). (Entered: 09/20/2011)
09/20/2011	41	Proposed Findings of Fact filed by Plaintiff Michael B. Kingsley re: 26 Motion for Summary Judgment. (jef),(ps) (Entered: 09/20/2011)
09/20/2011	42	Response to Proposed Findings of Fact filed by Plaintiff Michael B. Kingsley re: 26 Cross MOTION FOR SUMMARY JUDGMENT. (jef),(ps) (Entered: 09/20/2011)

DATE	NO.	PROCEEDINGS
09/20/2011	43	Declaration in opposition filed by Plaintiff Michael B. Kingsley re: 26 Motion for Summary Judgment. (Attachments: # 1 Plaintiff's verified complaint) (jef),(ps) (Entered: 09/20/2011)
09/20/2011	44	Declaration of exhibits filed by Plaintiff Michael B. Kingsley re: 26 Motion for Summary Judgment. (Attachments: # 1 Exhibit A-Wis. Stats. Ch. 350-350.27, # 2 Exhibit B-Prescription, patient instructions, diagnosis, # 3 Exhibit C-Monroe County Jail rules, # 4 Exhibit D-Inmate requests, # 5 Exhibit E-Inmate complaints and response, # 6 Exhibit F-Inmate general request form, # 7 Exhibit G-Monroe County log reports) (jef),(ps) (Entered: 09/20/2011)
09/20/2011	45	Declaration of Michael Kingsley re: 26 Motion for Summary Judgment. (Attachments: # 1 Exhibit A1-Inmate request to speak with an officer, 8/21/11,

DATE	NO.	PROCEEDINGS
		# 2 Exhibit A2-Inmate major violation report, 5/22/10) (jef),(ps) (Entered: 09/21/2011)
09/20/2011	46	Declaration of Michael Kingsley in Support of the Audio and Video. (Attachments: # 1 Exhibit A-Letter from attorney Andrew Jones, 9/2/11) (jef),(ps) (Entered: 09/21/2011)
	*	* * *
09/21/2011		Reset Deadlines as to defendants' 26 Cross MOTION FOR SUMMARY JUDGMENT. Defendants' Brief in Reply due 10/3/2011. (jef),(ps) (Entered: 09/21/2011)
	*	* * *
10/03/2011	50	Brief in Reply by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen in Support of 26 Motion for Summary Judgment (Posnanski, Timothy),(ps) (Entered: 10/03/2011)
10/03/2011	51	Reply in Support of Proposed Findings of Fact filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan

DATE	NO.	PROCEEDINGS
		Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Cross MOTION FOR SUMMARY JUDGMENT (Posnanski, Timothy),(ps) (Entered: 10/03/2011)
10/03/2011	52	Response to Proposed Findings of Fact filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Cross MOTION FOR SUMMARY JUDGMENT (Posnanski, Timothy),(ps) (Entered: 10/03/2011)
10/03/2011	53	Declaration of Peter F. Sewell filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Motion for Summary Judgment (Sealed Document) (Attachments: # 1 Exhibit A-CD) (Posnanski, Timothy),(ps) Modified exhibit description on 10/4/2011 (mmo). (Entered: 10/03/2011)
10/03/2011	54	Supplemental Declaration of Lisa Josvai filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish,

DATE	NO.	PROCEEDINGS
		Stan Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Motion for Summary Judgment (Sealed Document) (Attachments:
		# 1 Exhibit A-CD (Posnanski, Timothy),(ps) Modified exhibit description on 10/4/2011 (mmo). (Entered: 10/03/2011)
10/03/2011	55	Supplemental Declaration of Stan Hendrickson filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Motion for Summary Judgment (Posnanski, Timothy),(ps) (Entered: 10/03/2011)
	*	* * *
11/16/2011	69	ORDER granting in part and denying in part defendants' 26 Motion for Summary Judgment; denying plaintiff's 21 Motion for Partial Summary Judgment. Signed by District Judge Barbara B. Crabb on 11/16/11. (elc),(ps) (Entered: 11/16/2011)
	*	* * *
02/14/2012	75	Motion for reconsideration for appointment of counsel by Plaintiff Michael B. Kingsley. (Attachments:

DATE	NO.	PROCEEDINGS
		# 1 Cover Letter, # 2 Envelope) (jef),(ps) (Entered: 02/14/2012)
		* * * *
02/22/2012	77	ORDER granting plaintiff's 75 Motion to Appoint Counsel. Attorneys Edward J. Pardon, Wendy M. Ward and Joel Frederick Graham are appointed to represent plaintiff Michael B. Kingsley in this case. Proceedings in this case are STAYED pending a status conference, at which time a new schedule will be set to resolve this case. The deadlines set in the court's February 17, 2012 trial preparation order are STRICKEN. Signed by Magistrate Judge Stephen L. Crocker on 2/21/2012. (jef),(ps) (Entered: 02/22/2012)
02/22/2012		Set Telephone Pretrial or Status Conference: Telephone Status Conference set for Wednesday, 3/14/2012 at 01:30 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5153. (jef),(ps) (Entered: 02/22/2012)

DATE	NO.	PROCEEDINGS
03/19/2012	78	Pretrial Conference Order-Plaintiff's motion to clarify if he has an official capacity claim due 5/18/2012. Settlement Letters due 8/31/2012. Rule 26(a) (3) Disclosures and all motions in limine due 9/7/2012. Responses due 9/21/2012. Final Pretrial Conference set for 10/4/2012 at 04:00 PM. Jury Selection and Trial set for 10/9/2012 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 3/16/2012. (jef),(ps) (Entered: 03/19/2012)
	* * * *	
09/07/2012	84	Proposed Jury Instructions-Liability by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson (Jones, Andrew),(ps) (Entered: 09/07/2012)
09/07/2012	85	Proposed Jury Instructions-Damages by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson (Jones, Andrew),(ps) (Entered: 09/07/2012)
09/07/2012	86	Proposed Special Verdict-Liability by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson

DATE	NO.	PROCEEDINGS
		(Jones, Andrew),(ps) (Entered: 09/07/2012)
09/07/2012	87	Proposed Special Verdict-Damages by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson (Jones, Andrew),(ps) (Entered: 09/07/2012)
	*	* * *
09/07/2012	95	Proposed Special Verdict-Liability and Damages by Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 09/07/2012)
	*	* * *
09/07/2012	97	Proposed Jury Instructions-Liability and Damages by Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 09/07/2012)
	*	* * *
09/21/2012	115	Response to Proposed Liability and Damages Jury Instructions by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson (Posnanski, Timothy),(ps) (Entered: 09/21/2012)
	*	* * *

DATE	NO.	PROCEEDINGS
09/21/2012	117	Response to Proposed Liability and Damages Jury Instructions by Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 09/21/2012)
09/21/2012	118	Response to Proposed Special Verdict by Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 09/21/2012)
	*	* * *
09/28/2012	124	ORDER GRANTING IN PART and DENYING IN PART 89 Defendants' Motions in Limine; GRANTING IN PART and DENYING IN PART 96 Plaintiff's Motions in Limine. Signed by District Judge Barbara B. Crabb on 9/28/12. (elc),(ps) (Entered: 09/28/2012)
	*	* * *
10/02/2012	127	Stipulation to Amend Caption and for the Dismissal of Certain Claims by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson, Plaintiff Michael B. Kingsley. (Attachments: # 1 Text of Proposed Order to Amend Caption and for the Dismissal of Certain Claims) (Pardon, Edward),(ps) (Entered: 10/02/2012)

DATE	NO.	PROCEEDINGS
10/02/2012	128	Minute Entry for proceedings held before District Judge Barbara B. Crabb: Final Pretrial Conference held on 10/2/2012. Trial predicted to last 3 days. 14 jurors will be called forward. 8 jurors will be empaneled. [:37] Attention: In the event of a settlement of this matter over the weekend, counsel are advised to contact the Clerk of Court at (608) 287-4875 or the Chief Deputy Clerk at (608) 354-8004. (Court Reporter LS.) (elc),(ps) (Entered: 10/02/2012)
	*	* * *
10/03/2012	130	PRETRIAL CONFERENCE ORDER. Signed by District Judge Barbara B. Crabb on 10/3/2012. (jef),(ps) (Entered: 10/03/2012)
10/04/2012	131	ORDER granting 127 Stipulation to Amend Caption and for the Dismissal of Certain Claims. Signed by District Judge Barbara B. Crabb on 10/2/2012. (elc),(ps) (Entered: 10/04/2012)
	*	* * *
10/05/2012		Set/Reset Trial Deadlines/ Hearings: Jury Selection set for 10/9/2012 at 2:00 PM in

DATE	NO.	PROCEEDINGS
		courtroom 360. Jury Trial set for 10/15/2012 at 9:00 AM in courtroom 260. (lak),(ps) (Entered: 10/05/2012)
	*	* * *
10/11/2012	141	Joint Stipulation for Authentication and Admissibility of Evidence by Defendants Fritz Degner, Stan Hendrickson, Plaintiff Michael B. Kingsley. (Graham, Joel),(ps) (Entered: 10/11/2012)
10/15/2012		Set/Reset Trial Date: 2nd Day Jury Trial set for 10/16/2012 at 9:00 AM. (lak), (ps) (Entered: 10/15/2012)
10/15/2012	142	Minute Entry for proceedings held before District Judge Barbara B. Crabb: 1st Day Jury Trial held on 10/15/2012. Trial continues. [6:06] (Court Reporter CS/LS.) (elc),(ps) (Entered: 10/15/2012)
10/16/2012		Set/Reset Trial Date: 3rd Day Jury Trial set for 10/17/2012 at 9:00 AM. (lak), (ps) (Entered: 10/16/2012)
10/16/2012	143	Minute Entry for proceedings held before District Judge Barbara B. Crabb: 2nd Day Jury Trial held on 10/16/2012. Trial continues. [3:39] (Court

DATE	NO.	PROCEEDINGS
		Reporter CS/LS.) (elc),(ps) (Entered: 10/16/2012)
10/17/2012	144	Minute Entry for proceedings held before District Judge Barbara B. Crabb: 3rd Day Jury Trial held on 10/17/2012. Verdict returned in favor of Fritz Degner and Stan Hendrickson. [3:54] (Court Reporter LS.) (elc),(ps) (Entered: 10/18/2012)
10/18/2012	145	Introductory Jury Instructions. (elc),(ps) (Entered: 10/18/2012)
10/18/2012	146	Post-Trial Jury Instructions. (elc),(ps) (Entered: 10/18/2012)
10/18/2012	147	Jury Verdict Verdict returned in favor of Defendants Fritz Degner and Stan Hendrickson. (elc),(ps) (Entered: 10/18/2012)
10/18/2012	148	Plaintiff Michael Kingsley's exhibit list and received exhibits submitted to jury. (Attachments: # 1 Exhibit 5, # 2 Exhibit 9, # 3 Exhibit 10, # 4 Exhibit 12, # 5 Exhibit 37, # 6 Exhibit 50,

DATE	NO.	PROCEEDINGS
		# 7 Exhibit 60,
		# 8 Exhibit 100-Pages 1-100,
		# 9 Exhibit 100-Pages 101-204,
		# 10 Exhibit 108 (unable to be scanned in color)). Note: Exhibits 13 and 14 are videos and not able to be scanned in to ECF. (elc),(ps) (Entered: 10/18/2012)
10/18/2012	149	Defendants Fritz Degner and Stan Hendrickson's exhibit list and received exhibits submitted to jury. (Attachments:
		# 1 Exhibit 509 A,
		# 2 Exhibit 509 B,
		# 3 Exhibit 510 A,
		# 4 Exhibit 510 B,
		# 5 Exhibit 512,
		# 6 Exhibit 513,
		# 7 Exhibit 517,
		# 8 Exhibit 518) Note: Exhibits 520 is a video and not able to be scanned in to ECF.(elc),(ps) (Entered: 10/18/2012)
10/23/2012	150	JUDGMENT entered in favor of defendants dismissing this case. (BBC/PAO). (jef),(ps) (Entered: 10/23/2012)

DATE	NO.	PROCEEDINGS
10/24/2012	151	ORDER accepting 141 Joint Stipulation for Authentication and Admissibility of Evidence. Signed by District Judge Barbara B. Crabb on 10/11/2012. (jef), (ps) (Entered: 10/24/2012)
	*	* * *
11/05/2012	154	Transcript of Second Day of Jury Trial, Afternoon Session, held October 15, 2012 before Judge Barbara B. Crabb. Court Reporter: LS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (jef),(ps) (Entered: 11/05/2012)
11/05/2012	155	Transcript of Third Day of Jury Trial, Afternoon Session, held October 16, 2012 before Judge Barbara B. Crabb. Court Reporter: LS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (jef),(ps) (Entered: 11/05/2012)
11/05/2012	156	Transcript of Fourth Day of Jury Trial, Afternoon Session, held October 17, 2012 before Judge

DATE	NO.	PROCEEDINGS
		Barbara B. Crabb. Court Reporter: LS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (jef),(ps) (Entered: 11/05/2012)
11/05/2012	157	Transcript of Second Day of Jury Trial, Morning Session, held October 15, 2012 before Judge Barbara B. Crabb. Court Reporter: CS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (elc),(ps) (Entered: 11/05/2012)
11/05/2012	158	Transcript of Third Day of Jury Trial, Morning Session, held October 16, 2012 before Judge Barbara B. Crabb. Court Reporter: CS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (elc),(ps) (Entered: 11/05/2012)

* * * *

DATE	NO.	PROCEEDINGS
11/19/2012	162	NOTICE OF APPEAL by Plaintiff Michael B. Kingsley as to 150 Judgment. In forma pauperis requested. Docketing Statement filed. (Attachments: # 1 Docketing Statement) (Ward, Wendy),(ps) Modified docket text on 11/20/2012 (mmo). (Entered: 11/19/2012)
11/19/2012	163	Transcript Request Form by Plaintiff Michael B. Kingsley re 162 Notice of Appeal (Ward, Wendy),(ps) Modified on 11/20/2012; forwarded signed copy to USCA (mmo). (Entered: 11/19/2012)
11/19/2012	164	Transmission of Notice of Appeal, Docketing Statement, Appeal Information Sheet, Docket Sheet and Judgment to Seventh Circuit Court of Appeals re 162 Notice of Appeal (Attachments: # 1 Info sheet, # 2 Docketing statement, # 3 Judgment, # 4 Docket sheet) (mmo),(ps) (Entered: 11/19/2012)
11/19/2012		USCA Case Number 12-3639 for 162 Notice of Appeal filed by

DATE	NO.	PROCEEDINGS
		Michael B. Kingsley. (elc),(ps) (Entered: 11/19/2012)
	*	* * *
11/28/2012		Appeal Remark re 162 Notice of Appeal: Three "CD" Exhibits, #13 (to 54), #14 (to 53) and #520 (see 149)were returned to court to be included in the appeal record to the Seventh Circuit. Stored on shelf #13. (mmo),(ps) (Entered: 11/28/2012)
11/28/2012	166	Motion for Leave to Proceed in forma pauperis on Appeal by Plaintiff Michael B. Kingsley. (Attachments:
		# 1 Exhibit-Affidavit in support of IFP Motion,(refiled separately as 167)
		# 2 Exhibit-Trust Account Statement) (Ward, Wendy),(ps) Modified on 11/29/2012; sealed TFAS. (mmo). (Entered: 11/28/2012)
11/29/2012	167	Affidavit of Michael B. Kingsley filed by Plaintiff Michael B. Kingsley re: 166 Motion for Leave to Proceed In Forma Pauperis on Appeal, (Attachments:
		# 1 Exhibit-Trust Account Statement) (Ward, Wendy),(ps)

DATE	NO.	PROCEEDINGS
		(Additional attachment(s) added on 11/29/2012: # 2 IPP Calculation) (elc). Modified on 11/30/2012; sealed TFAS. (mmo). (Entered: 11/29/2012)
11/29/2012	168	ORDER granting plaintiff's 166 Motion for Leave to Appeal in forma pauperis. Plaintiff may have until December 21, 2012, in which to submit a check or money order made payable to the clerk of court in the amountof $5.83. Signed by District Judge Barbara B. Crabb on 11/29/2012. (jef),(ps) (Entered: 11/29/2012)
	*	* * *
12/06/2012	170	Motion for Reconsideration re 168 Order assessing initial partial appeal payment by Plaintiff Michael B. Kingsley. (Attachments: # 1 Envelope) (elc),(ps) (Entered: 12/06/2012)
12/06/2012	171	Declaration of Michael B. Kingsley re: 170 Motion for Reconsideration of order assessing initial partial appeal payment. (Attachments: # 1 November Trust Fund Account Statement) (elc),(ps) (Entered: 12/06/2012)

DATE	NO.	PROCEEDINGS
12/12/2012	172	ORDER denying plaintiff's 170 motion for reconsideration of the order assessing a $5.83 initial partial payment of the $455 appeal filing fee. Plaintiff may have an enlargement of time to January 7, 2013, in which to submit a check or money order made payable to the clerk of court in the amount of $5.83. Signed by District Judge Barbara B. Crabb on 12/11/2012. (jef),(ps) (Entered: 12/12/2012)
01/04/2013	173	Motion for Extension of Time *to Pay Initial Appeal Fee* by Plaintiff Michael B. Kingsley. Motions referred to Magistrate Judge Stephen L. Crocker. (Attachments: # 1 Undated Declaration) (Ward, Wendy),(ps) Modified on 1/4/2013; requested attorney refile Declaration as separate document. (mmo). (Entered: 01/04/2013)
01/04/2013	174	** TEXT ONLY ORDER ** Order GRANTING 173 Motion for Extension of Time. Plaintiff's initial partial appeal payment of $5.83 is due by January 21, 2013. Signed by Magistrate Judge Stephen L. Crocker on

DATE	NO.	PROCEEDINGS
		1/4/2013. (elc),(ps) (Entered: 01/04/2013)
01/04/2013	175	Declaration of Michael B. Kingsley filed by Plaintiff Michael B. Kingsley *(undated)* re: 173 MOTION for Extension of Time, (Ward, Wendy), (ps) (Entered: 01/04/2013)
01/11/2013		Appeal Initial Partial Filing fee received: $5.83, receipt number 16271. (jef), (ps) (Entered: 01/11/2013)
01/16/2013	176	Amended Declaration of Michael B. Kingsley filed by Plaintiff Michael B. Kingsley re: 173 MOTION for Extension of Time, (Attachments: # 1 Cover Letter) (Graham, Joel),(ps) (Entered: 01/16/2013)
	*	* * *
03/29/2013	178	Certified and Transmitted Record on Appeal to US Court of Appeals re 162 Notice of Appeal. (Attachments: # 1 Certification) (elc),(ps) (Entered: 03/29/2013)
04/16/2013	179	Notice of Withdrawal of Counsel by Joel Frederick Graham re: Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 04/16/2013)

DATE	NO.	PROCEEDINGS
	*	* * *
04/28/2014	181	JUDGMENT from USCA affirming district court as to 162 Notice of Appeal filed by Michael B. Kingsley. Record not returned. (Attachments: # 1 USCA Order denying petition for rehearing, # 2 Mandate) (elc),(ps) (Entered: 04/28/2014)
05/02/2014		Appeal Record Returned. (Exhibits 13, 13, 14 on 3 Original CDs/Exhibits A to Dkts. #53, 54). (jef),(ps) (Entered: 05/02/2014)

GENERAL DOCKET
SEVENTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket No. 12-3639

MICHAEL KINGSLEY,

v.

STAN HENDRICKSON, ET AL.,

Docketed: 11/19/2012
Termed: 03/03/2014

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/19/2012 26 pg, 959.71 KB	1	State prisoner's civil rights case docketed. IT IS ORDERED that this appeal is subject to the Prison Litigation Reform Act. Proceedings are SUSPENDED pending notification by the district court that any necessary fee has been assessed, and if assessed, paid. ~~Private civil case docketed~~. IFP pending in the District Court. Docketing statement filed. Transcript information sheet due by 12/03/2012. [1] [6444115] [12-3639] [Editted 12/7/12 by JAD to reflect that this is a prisoner civil rights case] (SM)

* * * *

DATE	NO.	PROCEEDINGS
11/30/2012 3 pg, 49.25 KB	4	Filed District Court order GRANTING Appellant Michael B. Kingsley leave to proceed on appeal in forma pauperis and assessed a $5.83 partial filing fee. Date IFP granted: 11/29/2012. Partial fee due 12/21/2012. [4] [6446549] [12-3639] (DS)
*	*	* *
12/21/2012 3 pg, 52.52 KB	8	Filed district court order dated 12/11/2012: The plaintiff may have until January 7, 2012, in which to submit a check or money order made payable to the clerk of court in the amount of $5.83. [8] [6451882] PLRA initial partial filing fee due by 01/07/2013. [12-3639] (JK)
01/10/2013 1 pg, 22.03 KB	9	Filed district court order dated 01/04/2013: Plaintiff's initial partial appeal payment of $5.83 is due by January 21, 2013. [9] [6455633] PLRA initial partial filing fee due by 01/22/2013. [12-3639] (JK)
01/11/2013 1 pg, 37.44 KB	10	***PRISON LITIGATION REFORM ACT PARTIAL FILING FEE. Received: $5.83 from Appellant Michael B. Kingsley on 01/11/2013. [10] [6456108] [12-3639] (EF)

DATE	NO.	PROCEEDINGS
01/14/2013 2 pg, 100.8 KB	11	ORDER: The District Court GRANTED the appellant leave to proceed on appeal in forma pauperis and has now received the initial partial filing fee. Briefing will proceed as follows: Appellant's brief due on or before 02/13/2013 for Michael B. Kingsley. Appellee's brief due on or before 03/15/2013 for Fritz Degner and Stan Hendrickson. Appellant's reply brief, if any, is due on or before 03/29/2013 for Appellant Michael B. Kingsley. [11] [6456525] [12-3639] (EF)
		* * * *
02/13/2013 63 pg, 1.13 MB	15	Appellant's brief filed by Appellant Michael B. Kingsley. Paper copies due on 02/21/2013 Electronically Transmitted. [15] [6464262] [12-3639] (RS)
02/13/2013 113 pg, 2.47 MB	16	Filed Appendix by Appellant Michael B. Kingsley. [16] [6464264] Paper copies due on 02/21/2013 [12-3639] (RS)
		* * * *
03/15/2013 48 pg, 144.6 KB	17	Submitted appellee brief by Andrew A. Jones for Appellees Fritz Degner and Stan Hendrickson. [17] [6471576] [12-3639] (Jones, Andrew)
03/15/2013	18	Submitted Supplemental

DATE	NO.	PROCEEDINGS
5 pg, 122.76 KB		Appendix by Andrew A. Jones for Appellees Fritz Degner and Stan Hendrickson. [18] [6471577] [12-3639] (Jones, Andrew)
	* * * *	
03/26/2013 1 pg, 86.3 KB	20	Notice to the District Court to transmit the record on appeal. [20] [6473907] [12-3639] (RS)
03/26/2013 4 pg, 138.34 KB	21	Argument set for Tuesday, April 23, 2013, at 10:30 a.m. in the Main Courtroom, Room 2721. Each side limited to 10 minutes. [21] [6473929] [12-3639] (RS)
	* * * *	
03/29/2013 20 pg, 149.89 KB	23	Appellant's reply brief filed by Appellant Michael B. Kingsley. Paper copies due on 04/05/2013 Electronically Transmitted. [23] [6475247] [12-3639] (SP)
	* * * *	
04/03/2013 2327 pg, 103.9 MB	25	Original record on appeal filed electronically. Contents of record: 13 vols. of pleadings. [25] [6476071] [12-3639] (AB)
04/03/2013 44 pg, 871.62 KB	26	Original record on appeal filed electronically. Contents of record: 7 sealed documents. [26] [6476072] [12-3639] (AB)
04/03/2013	27	Original paper record on appeal filed. Contents of record: 1 cd of

DATE	NO.	PROCEEDINGS
		exhibits; 1 sealed envelope. [27] [6476075] [12-3639] (AB)
04/03/2013	28	Filed electronic transcript of proceedings held on 10/15/12, 10/16/12 & 10/17/12. [28] [6476079] THIS TRANSCRIPT IS FOR INTERNAL COURT USE ONLY. Remote electronic access to the transcript is ONLY available through the District Court's PACER system. [12-3639] (AB)
	*	* * *
04/23/2013	33	Case heard and taken under advisement by panel: Kenneth F. Ripple, Circuit Judge; David F. Hamilton, Circuit Judge and J. P. Stadtmueller, District Court Judge. [33] [6480886] [12-3639] (GW)
04/23/2013	34	Case argued by Ms. Wendy M. Ward for Appellant Michael B. Kingsley and Timothy H. Posnanski for Appellees Fritz Degner and Stan Hendrickson. [34] [6480889] [12-3639] (GW)
03/03/2014 48 pg, 1.05 MB	35	Filed opinion of the court by Judge Ripple. AFFIRMED. Kenneth F. Ripple, Circuit Judge; David F. Hamilton, Circuit Judge, dissenting, and J. P. Stadtmueller, District Court Judge. [35] [6556344] [12-3639] (CD)

DATE	NO.	PROCEEDINGS
03/03/2014 1 pg, 602.22 KB	36	ORDER: Final judgment filed per opinion. With costs: no. [36] [6556348] [12-3639] (CD)
	*	* * *
03/17/2014 21 pg, 235.05 KB	39	Filed Petition for Rehearing and Petition for Rehearing Enbanc by Appellant Michael B. Kingsley. Paper copies due on 03/20/2014 [39] [6560137] [12-3639] (LJ)
03/20/2014 1 pg, 862.6 KB	40	Sent clerk's copy of request to Appellees Fritz Degner and Stan Hendrickson requesting 30 copies of their answer to the Petition for Rehearing and Petition for Rehearing Enbanc filed by Appellant Michael B. Kingsley on 03/17/2014. Answer to Petition for Rehearing due for Appellees Fritz Degner and Stan Hendrickson by 04/03/2014. [6561168] [12-3639] (AD)
03/26/2014	41	Supplemental paper record on appeal filed. Contents of record: 1 vol. exhibits; 1 sealed envelopes. [41] [6562553] [12-3639] (LJ)
	*	* * *
04/03/2014 22 pg, 95.05 KB	44	Filed Answer to Petition for Rehearing and Petition for Rehearing Enbanc by Appellees Fritz Degner and Stan Hendrickson. [44] [6564698]

DATE	NO.	PROCEEDINGS
		Paper copies due on 04/07/2014 [12-3639] (GW)
04/18/2014 2 pg, 1.24 MB	45	ORDER: Upon consideration of Plaintiff-Appellant's petition for rehearing with suggestion of rehearing en banc, filed on March 17, 2014, no judge in active service has requested a vote thereon .A majority of the judges on the original panel have voted to deny the petition. Judge Hamilton voted to grant panel rehearing. The petition for rehearing with suggestion of rehearing en banc is hereby DENIED. *Circuit Judge Flaum took no part in the consideration or the decision of this case. [45] [6569223] [12-3639] (AD)
04/28/2014 2 pg, 75.58 KB	46	Mandate issued. Entire record returned. [46] [6571302] [12-3639] (ACB)
	*	* * *
07/02/2014 2 pg, 48.54 KB	47	Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 08/18/2014. [47] [6588429] [12-3639] (FP)
09/24/2014 1 pg, 55.37 KB	48	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 14-6368 [48] [6607901] [12-3639] (DAM)

DATE	NO.	PROCEEDINGS
01/20/2015 1 pg, 80.96 KB	49	Filed order from the Supreme Court. The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are GRANTED. 14-6368. [49] [6635453] [12-3639] (MM)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 11/16/11]

10-cv-832-bbc

MICHAEL B. KINGSLEY,

Plaintiff,

v.

LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER AND KARL BLANTON,

Defendants.

OPINION and ORDER

In this civil action, plaintiff Michael B. Kingsley is proceeding pro se on claims that defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton used excessive force on him while he was a pretrial detainee in violation of his rights under the Fourteenth Amendment and state law. Additionally, he is proceeding on claims that defendants Patricia Fish and Lisa Josvai denied him his right to procedural due process.

Now before the court are the parties' cross motions for summary judgment. Plaintiff moves for summary judgment on only his due process claim. Dkt. #21. Defendants move for summary judgment on plaintiff's excessive force and due process claims. Dkt. #26.

(Defendants did not move for summary judgment on plaintiff's state law assault and battery claim. Their first and only mention of this claim is a footnote in their reply brief, in which they contend that "[f]or the same reasons that [plaintiff's] excessive force claim should be denied, [plaintiff's] state law assault and battery claim should likewise be denied." Dfts.' Reply Br., dkt. #50, at 12, n.4. Even if defendants had made this conclusory argument in their opening brief, I would not have been persuaded by it. The legal standard for plaintiff's constitutional excessive force claim is not the same as for his assault and battery claim.)

After reviewing the parties' arguments and the evidence in the record, I conclude that defendants' motion must be granted in part and denied in part. Defendants' motion must be denied with respect to plaintiff's claims that defendants Conroy, Hendrickson, Degner and Blanton used excessive force against him after they carried him to a receiving cell. There are too many material facts in dispute related to the reasonableness and necessity of the force used by defendants while they were in the receiving cell. However, I will grant defendants' motion as it relates to plaintiff's claim that defendants Conroy, Hendrickson, Degner and Blanton used excessive force against him when they removed him from his cell and carried him to the receiving cell. Plaintiff has adduced no specific evidence that defendants used excessive force against him during the transport.

Also, I will grant defendants' motion as it relates to plaintiff's claim that defendants Fish and Josvai violated his Fourteenth Amendment rights by failing to provide him procedural due process. The fact that plaintiff was held in a receiving cell for two days

without a hearing was not a sufficient deprivation of his liberty to require that defendants provide him a due process hearing at which he would have an opportunity to present witnesses to an impartial decision maker.

In finding which of the proposed material facts are in genuine dispute, I have taken into account the facts proposed by the parties, their responses and supporting affidavits and the videos of the incident filed by defendants.

UNDISPUTED FACTS

At all times relevant to this action, plaintiff Michael Kingsley was a pretrial detainee at the Monroe County jail. Defendants Lisa Josvai, Patricia Fish, Robert Conroy, Stan Hendrickson, Karl Blanton and Fritz Degner are corrections officers at the jail.

Plaintiff was booked into the Monroe County jail on April 21, 2010 and was transferred to the south block of the jail on May 1, 2010. On May 20, 2010, Deputy Nicholas Manka was performing a mandatory cell check and saw that the light fixture above plaintiff's bunk had been covered with a sheet of yellow legal paper. Manka told plaintiff to remove the paper covering the light. Plaintiff refused to remove the paper, stating that he did not put it there. (According to plaintiff, inmates often put paper over their lights because the lights are extremely bright. Plaintiff says the paper had been on the light in his cell since he was placed there.) Manka continued with his cell check, believing that plaintiff would remove the paper covering the light later.

After the jail was locked down for the evening, Manka did another cell check at approximately 10:45 p.m. During this cell check, Manka saw that plaintiff

had not removed the paper from the light fixture above his bunk. Manka asked plaintiff to remove the paper. (Defendants say that plaintiff responded by saying "better call in the CERT (Correctional Emergency Response Team) team." Plaintiff denies saying this.) Manka warned plaintiff that failure to comply with jail rules would result in disciplinary action. Later that night, Manka issued plaintiff an inmate minor violation report.

Deputy Manka told defendant Sergeant Hendrickson that he had issued a violation to plaintiff for his refusal to follow orders and explained what had happened. Hendrickson signed the inmate minor violation report and told defendant Blanton that plaintiff would be required to remove the paper from the light when the cells were open the next morning.

The next morning, May 21, 2010, defendant Blanton went to plaintiff's cell at approximately 5:25 a.m. Blanton told plaintiff to remove the paper covering the light. Plaintiff did not comply and did not respond to Blanton. At approximately 5:48 a.m., defendant Hendrickson performed "medication pass" (presumably this refers to the distribution of medication to inmates for whom it has been prescribed) and took plaintiff his medication. Hendrickson asked plaintiff to remove the paper attached to the light. Initially, plaintiff did not respond. After a few requests, plaintiff told Hendrickson that he would not remove the paper because he did not put it there. Hendrickson told plaintiff several times that he still needed to take it down. Plaintiff did not respond

At approximately 6:13 a.m., defendant Henrickson called jail administrator defendant Robert Conroy to tell him about the situation with plaintiff. Conroy

arrived at the jail at approximately 6:30 a.m. Henderson told Conroy that plaintiff would not respond to orders and Conroy said that he would talk to plaintiff. At approximately 6:33 a.m., Conroy went to plaintiff's cell and asked him to remove the paper from the light fixture. (Defendants say that Conroy told plaintiff the paper was a fire hazard. Plaintiff denies this.) Conroy asked plaintiff several times, but plaintiff refused to take the paper down. Conroy told plaintiff he would remove the paper from the light fixture, but plaintiff would have to be moved to receiving so that a management team could enter plaintiff's cell. Conroy also told plaintiff that he would face disciplinary action because he was failing to follow staff orders.

At approximately 6:38 a.m., defendants Hendrickson, Blanton, Degner, Conroy and Sergeant Shisler went to plaintiff's cell to take him to receiving so that the paper could be removed from the light fixture. Hendrickson ordered plaintiff to stand up and back up to the cell door. Plaintiff asked, "What for? I didn't do anything wrong." Defendant Degner told plaintiff that if he did not comply he would be tasered. Hendrickson ordered plaintiff again to stand up. Plaintiff continued to lie face down on his bunk, but put his hands behind his back. Hendrickson and Blanton entered the cell and attempted to handcuff plaintiff. (Defendants say that plaintiff began tensing and tightening his arms and holding them apart, making it difficult to handcuff him. Plaintiff denies that he was resisting in any way. Defendants did not submit a video that captured the events in plaintiff's cell.) The officers eventually handcuffed plaintiff by applying their body weight to plaintiff to secure him while they handcuffed him. Defendants Blanton and Hendrickson asked plaintiff to stand, but plaintiff refused. Defendants pulled

plaintiff to his feet, and plaintiff fell to his knees, stating that his foot hurt and he could not walk. (Plaintiff says that when defendants pulled him from the bunk, his feet hit the bed frame, caused him serious pain and making him incapable of standing or walking.) Plaintiff would not stand up or walk. Defendants asked plaintiff what was wrong with his foot but he did not respond. The video of this incident shows two officers (defendants Blanton and Hendrickson) carrying plaintiff out of his cell and out of the south cell block by holding him under his arms.

After plaintiff was taken out of the south cell block, he was placed face down on the floor in the hallway. Defendants asked plaintiff what was wrong with his foot, but he did not answer. Deputy Shisler and defendants Conroy, Blanton and Hendrickson carried plaintiff from the hallway into a receiving cell. Plaintiff was placed face down on the receiving cell bunk. Hendrickson and Blanton then attempted to remove his handcuffs.

The parties dispute what happened next and, although defendants submitted a security video from the receiving cell, the view of plaintiff is obstructed by the officers in the cell. Defendants say that plaintiff became physically resistive, pulling the handcuffs apart and trying to get up. The video shows defendant Hendrickson and the officers telling plaintiff repeatedly to relax and stop resisting so that the handcuffs could be removed, but it is not clear from the video whether plaintiff was resisting or struggling. Plaintiff does not appear to be moving his body around aggressively or very much at all, and plaintiff denies being physically resistive or struggling against the handcuffs. However, it is impossible to tell from the

video whether plaintiff was "tensing" his arms as defendants aver.

The video shows defendant Hendrickson putting his knee on plaintiff's back and plaintiff telling Hendrickson to "get the fuck off." (Plaintiff says that at this point, defendants slammed his head down into the concrete cell bed, causing plaintiff serious pain. Defendants deny this. It is not clear from the video whether this happened.)

The verbal exchanges between the parties are not clear on the video. Defendants say that defendant Degner, who was standing to the side with the taser, warned plaintiff that if he did not comply, he would be tasered. Defendant Hendrickson told Degner to apply a "contact stun" to plaintiff. Plaintiff says that Hendrickson told Degner to "tase his ass." Degner applied a contact stun for five seconds on plaintiff's back. (Plaintiff says that the taser caused him "excruciating pain.") Defendant Conroy, who had been waiting in the hall, ordered everyone to clear the cell.

Approximately 15 minutes later, defendant Conroy decided to try again to remove plaintiff's handcuffs. Deputy Tom Wildes, Deputy Bedenbaugh and defendants Blanton and Conroy entered the receiving cell and were able to remove the handcuffs. Following the incident, plaintiff was placed on medical watch. At 7:05 a.m., defendant Blanton asked a jail nurse to examine plaintiff. The nurse came to the receiving cell to check plaintiff for injuries. Plaintiff refused to see her and did not seek any medical attention for any injuries allegedly sustained during his removal from his cell.

After the incidents on May 21, 2010, defendant Patricia Fish reviewed the incident reports prepared

by Deputy Manka and defendants Conroy, Hendrickson, Degner and Blanton. Fish determined that plaintiff had violated four separate Monroe County jail rules: (1) failing to follow lawful orders; (2) resisting jail officers; (3) disorderly conduct; and (4) causing jail disruption. She prepared an inmate major violation report and concluded that plaintiff should receive 10 days in a receiving cell as punishment for his violations of the jail rules.

On May 22, defendant Fish went to plaintiff's cell in receiving, gave him the inmate major violation report and told him that she had imposed 10 days in receiving as sanctions for his violations of jail rules. Fish told plaintiff that he had a right to a hearing regarding his violation of jail rules and that she would conduct the hearing on the disciplinary sanctions she had decided to impose on plaintiff. She asked plaintiff whether he wanted a hearing or whether he would waive his right to a hearing. Plaintiff said that he did not understand his hearing rights and asked "What's the point of having a hearing when it seems to me, though, you have your mind made up without the hearing?" Plaintiff handed the inmate major violation report back to Fish and stated "I didn't understand my hearing rights . . . it seems you had your mind made up, if I had a hearing or if I didn't have a hearing, I would get the 10 days regardless." Plaintiff refused to sign the inmate major violation report and Fish left.

A few minutes later, plaintiff saw defendant Fish in the hallway and asked if he could speak to her. He told her that he wanted a disciplinary hearing. Fish told plaintiff that he had waived his right to a disciplinary hearing when he refused to sign the inmate major violation report. Plaintiff told Fish that he wished to appeal her decision.

On May 23, defendant chief deputy Josvai considered plaintiff's appeal. She reviewed the incident reports and questioned plaintiff. She told plaintiff that she would increase the sanctions imposed on him if she could. Ultimately, she determined that the 10-day sanction was appropriate.

On May 24, defendant Conroy reviewed defendants Fish's and Josvai's decisions and decided that plaintiff had not waived his right to a disciplinary hearing. Conroy overturned the 10-day sanctions and ordered that plaintiff be returned to a regular cell. Plaintiff was returned to a regular cell that morning and did not receive any further penalties or discipline related to the May 21 incident.

OPINION

A. Excessive Force

Plaintiff contends that defendants Conroy, Hendrickson, Degner and Blanton used excessive force to pull him off his bunk and drag him through the hall and that he suffered an injury to his foot and wrists as a result. Additionally, plaintiff contends that defendants used excessive force against him by slamming his head onto the concrete cell bed and tasing him when he was handcuffed in the receiving cell. Defendants contend that their actions did not constitute excessive force and even if they did, they are entitled to qualified immunity on plaintiff's excessive force claim.

Because plaintiff was a pretrial detainee at the time of the incident, his claim of excessive force falls under the due process clause of the Fourteenth Amendment. *Forrest v. Prine*, 620 F.3d 739, 743-44 (7th Cir. 2010); *Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009). The court of appeals has explained

that "[t]he Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment." *Forrest*, 620 F.3d at 744. However, "the exact contours of any additional safeguards [guaranteed by the Fourteenth Amendment] remain undefined." *Lewis*, 581 F.3d at 474. Neither plaintiff nor defendants have identified any protections guaranteed by the Fourteenth Amendment that would have provided plaintiff more protection than he would received under traditional Eighth Amendment standards. Thus, I will use the Eighth Amendment standards for excessive force cases to analyze plaintiff's Fourteenth Amendment claim. *Id.* at 475 (applying Eighth Amendment excessive force standard to pretrial detainee's excessive force claim); *Forrest*, 620 F.3d at 744 (same).

To determine whether a prison official's use of force on a prisoner was "excessive" in violation of the Eight Amendment, a court must determine "whether [the] force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The factors relevant to making this determination include:

- the need for the application of force;
- the relationship between the need and the amount of force that was used;
- the extent of injury inflicted;
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and

- any efforts made to temper the severity of a forceful response.

Whitley, 475 U.S. at 321.

Plaintiff has adduced no evidence that defendants used excessive force against him when they entered his regular cell, handcuffed him, pulled him off the bunk and carried him to the receiving cell. Plaintiff says that defendants pulled him off the bed in "an excessive way," Plt.'s Dep., dkt. #31-1, at 33, but that is too conclusory a statement to create a genuine issue of material fact. He provides no details about how defendants' actions were "excessive." Moreover, it is undisputed that plaintiff did not get off the bunk or stand up when ordered to do so, thus requiring defendants to pull him up from the bunk. Although plaintiff says that his feet hit the bedframe when defendants pulled him up, he has adduced no evidence suggesting that defendants intentionally caused his feet to hit the bedframe or intended to harm him in anyway. Additionally, defendants asked plaintiff repeatedly what was wrong with his foot and whether he could walk, but plaintiff responded only by saying that his foot hurt and refusing to stand up. Thus, defendants carried him to the receiving cell. No reasonable jury could infer from these allegations that defendants used force against plaintiff "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline."

However, there is a genuine dispute of material fact regarding whether defendants used excessive force against him once he was in the receiving cell. In particular, there is a dispute about whether defendants slammed plaintiff's head into the concrete bed and used a taser against him solely for the purpose

of causing him harm. Plaintiff says that defendants slammed his head into the concrete cell bed and used a taser against him even though he was not resisting or posing any risk of harm to jail staff or anyone else. He says that to the extent defendants were having difficulty removing his handcuffs, it was solely because they had put the handcuffs on too tightly and because they were kneeling on his back and causing his body to tense. Although defendants deny slamming plaintiff's head and say that plaintiff was resisting their attempts to remove his handcuffs, this is a factual dispute that must be resolved by a jury. The video of the incident is the only objective evidence in the record and it does not establish whether plaintiff was resisting, whether defendants slammed plaintiff's head into the concrete slab or whether defendants' use of the taser was reasonable. The video shows only that plaintiff was handcuffed, lying on his stomach and surrounded by correctional officers when the alleged excessive force occurred. If a jury were to believe plaintiff's version of events, the jury could conclude that because plaintiff was not resisting and posed no safety threat at the time defendants slammed his head and used the taser against him, defendants' use of force was disproportionate to the situation. In addition, a jury could conclude that defendants made no efforts to temper the severity of the force and that defendants intended to harm plaintiff.

Defendants cite several cases that they contend support their use of force, but the cases do not change my conclusion that a genuine dispute of fact exists that must be resolved by a jury. First, defendants contend that under circuit precedent, prison guards may use force against inmates who are refusing to comply with orders. They cite *Soto v. Dickey*, 744 F.2d 1260, 1267

(7th Cir. 1984), in which the court of appeals stated that

> Orders given must be obeyed. Inmates cannot be permitted to decide which orders they will obey, and when they will obey them . . . . Inmates are and must be required to obey orders. When an inmate refuse[s] to obey a proper order, he is attempting to assert his authority over a portion of the institution and its officials. Such refusal and denial of authority places the staff and other inmates in danger.

However, the issue in this case is not whether plaintiff was required to obey staff's orders to remove the paper from his light, to walk down the hallway or to cooperate with defendants' attempts to remove his handcuffs. The issue is whether defendants' response to plaintiff's obstinance was reasonable under the circumstances or whether it was excessive and was intended to cause plaintiff harm.

Also, defendants cite several cases in which the court of appeals discusses the use of tasers in jail and prison. *E.g.*, *Lewis*, 581 F.3d at 476 (recognizing "the important role that non-lethal, hands-off means—including taser guns—play in maintaining discipline and order within detention facilities"); *Forrest*, 620 F.3d at 745 ("in a jail or prison setting, it is not hard to imagine any number of scenarios that would justify the [use of] . . . taser guns") (citation omitted). These cases are not particularly helpful to defendants, because the court of appeals has explained explicitly that whether an application of force is excessive depends on the circumstances. As the court of appeals explained in *Lewis*,

> In many circumstances—often when faced with aggression, disruption, or physical threat—compelling compliance with an order is a valid penological justification for use of a taser. But such justification does not necessarily exist every time an inmate is slow to comply with an order. What must be decided in each case . . . is whether the facts surrounding the taser's deployment . . . demonstrated actual malice or sadistic purpose on the part of the user.

Lewis, 581 F.3d at 477 (internal citations omitted).

In *Lewis*, the court of appeals also explained that the use of taser guns may be appropriate when "the victims have been violent, aggressive, confrontational, unruly, or presented an immediate risk of danger to themselves or others. . . . [because] [s]uch behavior certainly increases the need for force and often poses a threat to the security officers." *Id.* (collecting cases). If a jury accepted plaintiff's version of events in this case, it could conclude that the defendants' use of the taser was wanton and malicious because plaintiff was not violent, aggressive, unruly or even resistant and posed no threat to defendants.

Finally, I agree with plaintiff that defendants are not entitled to qualified immunity on plaintiff's excessive force claim. Qualified immunity applies whenever a government official's actions, even if unconstitutional, did not violate the "clearly established law" at the time. *Pearson v. Callahan*, 555 U.S. 223, 822 (2009); *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011). Once the defendant has raised a qualified immunity defense, the plaintiff has the burden to show that it should not apply. *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007). As explained above, a reasonable jury could conclude that

defendants acted with malice and intended to harm plaintiff when they used force against him. "The notion that unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment is not a new or unusual constitutional principle." *Hill v. Shelander*, 992 F.2d 714, 718 (7th Cir. 1993) (internal quotations and citations omitted). Nor is the notion that the Fourteenth Amendment provides at least as much protection from excessive force as the Eighth Amendment. *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996). Thus, defendants are not entitled to qualified immunity and are not entitled to summary judgment on plaintiffs' claim that defendants used excessive force against him in the receiving cell. *Lewis*, 581 F.3d at 478-79 (summary judgment inappropriate because there was genuine issue of fact regarding whether officer's use of taser was malicious and qualified immunity did not apply).

B. Due Process

Plaintiff and defendants have moved for summary judgment on plaintiff's claim that defendants Josvai and Fish violated his procedural due process rights under the Fourteenth Amendment by providing him no process before placing him in a receiving cell. To establish a procedural due process violation, plaintiff must show that he was deprived of a "liberty interest" and that this deprivation took place without the procedural safeguards necessary to satisfy due process. *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995); U.S. Const. amend. XIV. Plaintiff contends that he was entitled to receive at least as much process as convicted prisoners are entitled to receive, namely, advance written notice of the charges against him; a hearing before an impartial decision maker at which

he could have presented testimony and evidence; and, for any disciplinary action taken, a written explanation, supported by at least "some evidence" in the record. *Wolff v. McDonnell*, 418 U .S. 539, 563-71(1974); *Lagerstrom v. Kingston*, 463 F.3d 621, 624 (7th Cir. 2006). Plaintiff contends that he was denied due process because (1) he was not given copies of the incident reports before he was found guilty of violating jail rules; (2) he was not given a hearing at which he could present evidence and witnesses; (3) defendant Fish, the decision maker, was not impartial because she had decided that plaintiff was guilty of the charges and should be placed in segregation for 10 days before she offered plaintiff a hearing; (4) defendant Fish did not explain the reason for the disciplinary sentence she imposed; and (5) defendant Josvai failed to correct Fish's due process violations on appeal.

I agree with plaintiff that defendant Fish would not have been an impartial decision maker who could have conducted a hearing in compliance with the due process requirements set forth in *Wolff*, 418 U .S. at 563-71. Fish had made up her mind about plaintiff's guilt and the punishment he should receive before listening to plaintiff's version of events or any testimony from plaintiff's witnesses. Additionally, I agree with plaintiff that he did not waive his right to a hearing by telling Fish that he did not understand his hearing rights. Nonetheless, I conclude that plaintiff cannot establish a violation of his due process rights.

In *Rapier v. Harris*, 172 F.3d 999 (7th Cir. 1999), the court of appeals held that a pretrial detainee cannot be punished for disciplinary infractions that occur during detention without being afforded due process. *Id.* at 1005-06. However, the court of appeals has also

explained that the due process clause does "not confer a right to a *predeprivation* hearing in every case in which a public officer deprives an individual of liberty or property." *Holly v. Woolfolk*, 415 F.3d 678, 680 (7th Cir. 2005) (emphasis added). In *Holly*, the court of appeals held that a pretrial detainee's placement in segregation for two days without a prior hearing did not violate his due process rights. *Id.* at 680-81. Corrections officers had reason to believe that the detainee was disrupting a jail headcount, which had the potential to interfere with jail security and discipline. In finding no due process violation, the appellate court analogized the two-day detention to the 48 hours in which a person can be arrested and held before being charged with a crime or given a hearing. *Id.* at 680-81. *See also Protect Marriage Illinois v. Orr*, 463 F.3d 604, 608 (7th Cir. 2006) ("what is required in the name of due process depends" on circumstances). More recently, the court of appeals explained that "[d]isciplinary measures that do not substantially worsen the conditions of confinement of a lawfully confined person are not actionable under the due process clause, regardless of whether the confinement is criminal or civil." *Miller v. Dobier*, 634 F.3d 412, 415 (7th Cir. 2011) (citing *Sandin*, 515 U.S. at 485-86).

Like the pretrial detainee in *Holly*, plaintiff was held in a receiving cell for only two days because defendant Conroy released him after determining that plaintiff should have been given a hearing. As in *Holly*, the defendants had valid managerial reasons for placing plaintiff in the receiving cell initially. In particular, it is undisputed that plaintiff refused several orders from jail staff to remove the paper from his light and that he had to be removed from his cell so that staff could remove the paper. As the court

explained in *Holly*, it may be appropriate for jail staff to separate a detainee without providing him a hearing when staff has "probable cause to believe [he] has violated a disciplinary rule." *Id.* at 681. In other words, a limited detention of a pretrial detainee while he is awaiting a hearing is constitutionally permissible. *Id.*; *see also Dunkin v. Dart*, 2010 WL 3547969, *5 (N.D. Ill. Sept. 2, 2010) ("plaintiff had no right to remain in the general population prior to the disciplinary hearing"); *Williams v. County of Cook*, 2010 WL 3324718, *7-8 (N.D. Ill. Aug. 19, 2010) (being held for 10 days in segregation before hearing did not violate pretrial detainee's due process rights). In this case, plaintiff was never provided a hearing or opportunity to be heard. However, he never received any punishment beyond the two days in spent in the receiving cell. Under the circumstances, the mere fact that plaintiff was segregated from the general population for a short time is not sufficient by itself to rise to a violation of his due process rights. Therefore, I will deny plaintiff's motion for summary judgment on this claim and grant summary judgment to defendants.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Kingsley's motion for partial summary judgment, dkt. #21, is DENIED.

2. The motion for summary judgment filed by defendants Lisa Josvai, Patricia Fish, Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton, dkt. #26, is GRANTED IN PART AND DENIED IN PART. Defendants' motion is DENIED with respect to plaintiff's claims that defendants Conroy, Hendrickson, Degner and Blanton used excessive force

against plaintiff in violation of the Eighth Amendment after plaintiff had been carried to a receiving cell on May 21, 2010. Defendants' motion for summary judgment is GRANTED in all other respects.

Entered this 16th day of November, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 9/07/12]

10-CV-832

MICHAEL B. KINGSLEY,

Plaintiff,

v.

LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER AND KARL BLANTON,

Defendants.

PROPOSED JURY INSTRUCTIONS OF DEFENDANTS FOR LIABILITY PHASE OF TRIAL

Pursuant to the Court's Preliminary Pretrial Conference Order and Procedures Governing Final Pretrial Conference, defendants, Robert Conroy, Stan Hendrickson, Fritz Degner, and Karl Blanton, hereby submit their proposed jury instructions for the liability phase of trial. Defendants request these jury instructions without waiving their right to amend, supplement, or withdraw all or any portion of these instructions as the evidence and the Court's rulings at trial may dictate.

Defendants wish to include the following Standard Jury Instructions – Civil as provided by the Court along with the Preliminary Pretrial Conference Order:

Introductory Instructions

(1) Introductory Instruction

(2) Credibility of Witnesses

(3) Depositions

(4) Objections

(5) Questions

(6) Notetaking

(7) Evidence

(8) Contradictory or Impeaching Evidence

(9) Drawing of Inferences

(10) Experts

Post-Trial Instructions

(1) Introduction

(2) Burden of Proof

(3) Answers Not Based on Guesswork

(4) Selection of Presiding Juror; Communication with the Judge; Verdict

(5) Suggestions for Conducting Deliberations

In addition to these standard jury instructions, defendants request the additional instructions set forth below.

Defendants' Proposed Instruction 1: Multiple Claims; Multiple Plaintiffs/Defendants

You must give separate consideration to each claim and each party in this case. Although there are *four individual* defendants, it does not follow that if one is liable, any of the others is also liable. In considering a claim against a defendant, you must not consider evidence admitted only against other defendants.

Source: Seventh Circuit Pattern Jury Instructions – Civil § 1.25.

Defendants' Proposed Instruction 2: Dismissed Defendants

Lisa Josvai and Patricia Fish are no longer defendants in this case. You should not consider any claims against Ms. Josvai or Ms. Fish. Do not speculate on the reasons. You should decide this case as to the remaining parties.

Source: Seventh Circuit Pattern Jury Instructions – Civil § 1.26.

Defendants' Proposed Instruction 3: Police Department/Municipality not a Party

Defendants are being sued as individuals. *No municipal entity, including Monroe County*, is a party to this lawsuit.

Source: Seventh Circuit Pattern Jury Instructions – Civil § 7.01.

Defendants' Proposed Instruction 4: Impeachment of Witness – Convictions

You have heard evidence that Plaintiff has been convicted of a crime. You may consider this evidence only in deciding whether Plaintiff's testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

Source: Seventh Circuit Pattern Jury Instructions – Civil § 1.15.

Defendants' Proposed Instruction 5: Excessive Force

In this case, Plaintiff claims that Defendants used excessive force against him. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that the force used by Defendants was not applied in a good faith effort to maintain or restore discipline, but was instead applied maliciously or sadistically for the very purpose of causing harm.

In deciding whether Plaintiff has proved that Defendants used excessive force, you may consider such factors as:

- the need for the application of force;
- the relationship between the need for the use of force and the amount of force used;
- the extent of the injury inflicted;
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and
- any efforts made by the Defendants to temper or limit the amount of force.

Source: *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); Dkt. No. 69, p. 11.

Defendants' Proposed Instruction 6: Battery

Question _____ asks you to determine whether Defendants (used excessive force) *battered* (in arresting) Plaintiff. It is admitted that Defendants made contact with Plaintiff and used force *against him* (at the time of making the arrest), which force, if not reasonable under the circumstances, would constitute a battery.

As law enforcement officers, Defendants (had) *have* the duty to *maintain the safety and security of the jail* (enforce the laws of Wisconsin) and (in making an arrest) may use reasonable force to overcome the resistance of *a prisoner* (the person being arrested). This force, however, must not be excessive; that is, the officer must not use more force than necessary under all of the circumstances.

The fact that the evidence in this case shows physical contact between Defendants and Plaintiff (which resulted in injury to Plaintiff,) is not proof that Defendants used excessive force.

Defendants had the lawful authority to use such force (in making the arrest) as a reasonable (police) officer would believe to be necessary. But the use of force beyond that which a reasonable (police) officer would believe necessary under all the circumstances then existing is excessive force.

(The fact that defendant believed plaintiff was guilty of a crime is irrelevant. Persons being arrested have a right not to be mistreated by the use of excessive force.)

Source: Wisconsin Jury Instruction – Civil: 2008.

Dated this 7th day of September, 2012.

s/ Andrew A. Jones
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 9/07/12]

10-CV-832

MICHAEL B. KINGSLEY,

Plaintiff,

v.

LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER AND KARL BLANTON,

Defendants.

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

Plaintiff, by his undersigned attorneys, submits the attached proposed jury instructions, to be given in addition to the Court's standard jury instructions.

With respect to the Court's standard post-trial jury instructions, Plaintiff believes that the following instructions are not necessary or an alternate instruction should be used:

"Middle Burden of Proof" (not necessary)

"Duty to Mitigate Damages" (not necessary)

"Mortality Tables" (not necessary)

"Future Earnings" (not necessary)

"Pain and Suffering" (modified)

Dated: September 7, 2012

Respectfully submitted,

MERCHANT & GOULD, P.C.

By: */s/ Joel F. Graham*

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PLAINTIFF'S PROPOSED INSERTION FOR THE COURT'S STANDARD INTRODUCTORY INSTRUCTION

Plaintiff proposes the following insertion beginning at the second paragraph of the Court's standard Introductory Instructions:

The party who begins the lawsuit is called the plaintiff. In this action, the plaintiff is Michael Kingsley. The parties against whom the suit is brought are called the defendants. In this action, the defendants are Stanley Hendrickson, Robert Conroy, Fritz Degner, and Karl Blanton. The defendants are employees of the Monroe County Jail. The plaintiff, Mr. Kingsley, alleges that the defendants used excessive force against him while he was an inmate at the jail. Excessive force in this context means unreasonable force under the totality of the circumstances. You will receive further instruction on how to evaluate this after the parties have presented their case.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 1

ALL PERSONS EQUAL BEFORE THE LAW

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

Authority: 3B Kevin F. O'Malley et al., Federal Jury Practice and Instructions: Civil § 103:11 (6th ed. 2011).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 2

CONSIDERATION OF ALL EVIDENCE REGARDLESS OF WHO PRODUCED

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 1.08 (2005 rev.)

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 3 (IF NEEDED)

IMPEACHMENT OF WITNESS CONVICTIONS

You have heard evidence that *Michael Kingsley* has been convicted of a crime. You may consider this evidence only in deciding whether *Michael Kingsley's* testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 1.15 (2005 rev.) (modified).

The material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instruction.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 4

NUMBER OF WITNESSES

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a large number. You need not accept the testimony of the larger number of witnesses.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 1.17 (2005 rev).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 5

NATURE OF THE ACTION

Plaintiff *Michael Kingsley* claims damages alleged to have been sustained as the result of a deprivation, under color of state law, of a right secured to plaintiff *Michael Kingsley* by the (Fourth Amendment) *Fourteenth Amendment* of the United States Constitution and by a federal statute protecting the civil rights of all persons within the United States.

Specifically, plaintiff *Michael Kingsley* alleges that defendant (police officers) *Monroe County Sheriff's Department employees* subjected plaintiff Michael Kingsley to deprivation of rights and privileges secured and protected by the Constitution and laws of the United States, namely the Constitutional right to be free from the excessive use of force against plaintiff's person (during the course of an arrest) *while a pretrial detainee*.

(Defendant police officers deny that any of their actions during the time in question violated plaintiff's constitutional rights. Defendant police officers *allege* that they were acting in good faith and with probable cause and that their actions were reasonable. Defendant police officers further claim that they were not guilty of any fault or wrongdoing in regard to the incident sued upon.)

The defendants are Stan Hendrickson, Robert Conroy, Fritz Degner, and Karl Blanton.

Authority: 3B Kevin F. O'Malley et al., Federal Jury Practice and Instructions: Civil § 165.01 (5th ed. 2001) (modified).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 6

FOURTH AMENDMENT / FOURTEENTH AMENDMENT: EXCESSIVE FORCE AGAINST (ARRESTEE OR PRETRIAL DETAINEE ELEMENTS

In this case, Plaintiff claims that Defendants used excessive force against him. To succeed on this claim, Plaintiff must prove (each of the following things) by a preponderance of the evidence *that Defendants used unreasonable force against him.*

(1. Defendant used unreasonable force against Plaintiff;)

Special Verdict Question No. 1 asks you to evaluate whether unreasonable force was used against Plaintiff. You should evaluate this question separately with respect to each individual Defendant.

If you find that Plaintiff has proved (each of these things) *the use of unreasonable force* by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff did not prove *the use of unreasonable force* (any one of these things) by a preponderance of the evidence, then you should find for Defendants, and you will not consider the question of damages.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.08 (2005 rev.) (modified); Committee Comments to Federal Civil Jury

Instructions of the Seventh Circuit $ 7.08 (b), (c). (d); Defendants' Response to Plaintiff's Request for Admission No. I (admitting actions were done under color of law).

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instruction.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 7

FOURTH AMENDMENT / FOURTEENTH AMENDMENT: EXCESSIVE FORCE DEFINITION OF "UNREASONABLE"

You must decide whether *each individual* Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that *he* (Defendant) faced. You must make this decision based on what the officer knew at the time of the *incident*, (arrest,) not based on what you know now. In deciding whether *the* (Defendant's) use of force was unreasonable, you must not consider whether *that person's* (Defendant's) intentions were good or bad.

In performing his job, an officer can use force that is reasonably necessary under the circumstances.

In considering whether the use of force was unreasonable, you may consider

The need for the use of force;

The relationship between the need for the use of force and the amount of force used;

- *The extent of the Plaintiff s injury;*

Any efforts made by the officer to temper or limit the amount of force;

The severity of the crime at issue; and

The threat reasonably perceived by the officer.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.09 (2005 rev.) (modified); Committee Comments to Federal Civil Jury Instructions of the Seventh Circuit § 7.09 (b).

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instruction.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 8

FAILURE BYSTANDER OFFICER TO INTERVENE

In the case of Defendant Robert Conroy, you may also find he is liable for excessive force if he failed to stop any of the other defendants from using excessive force. To succeed on *this* (his failure to intervene) claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. *At least one of the other defendants used unreasonable force on Mr. Kingsley*;
2. *Lt. Conroy* (Defendant) knew that *at least one of the other defendants* was about to *use unreasonable force on Mr. Kingsley*;
3. *Lt. Conroy* (Defendant) had a realistic opportunity to do something to prevent *the unreasonable use of force* (harm) from occurring;
4. *Lt. Conroy* (Defendant) failed to take reasonable steps to prevent *the unreasonable use of force* (harm) from occurring.(;)
5. (Defendant's failure to act caused Plaintiff to suffer harm ;).

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, *and that none of the other defendants used unreasonable force*, (then you should find for Defendant, and) you will not consider the question of damages.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.16 (2005 rev.) (modified); Defendants' Response to Plaintiff's Request for Admission No. 1 (admitting actions were done under color of law)

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally brackets.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 9

DAMAGES: PREFATORY INSTRUCTION

If you find that Plaintiff has proved any of his claims against *at least one* of the Defendants, then you must determine what amount of damages, if any, Plaintiff is entitled to recover.

If you find that Plaintiff has failed to prove all of his claims, then you will not consider the question of damages.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.22 (2005 rev.) (modified).

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instruction.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 10

DAMAGES: COMPENSATORY

Special Verdict Question No. 2 asks you about compensatory damages. If you find *that at least one Defendant used unreasonable force against Plaintiff, then you must determine whether Plaintiff was harmed by that unreasonable force and if so,* (in favor of Plaintiff,) then you must determine the amount of money that will fairly compensate Plaintiff. (for any injury that you find he sustained as a direct result of)

These are called "compensatory damages."

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

In this case, you (You) should consider *pain and suffering*. (the following types of compensatory damages, and no others:)

In determining how much money will fairly and reasonably compensate Plaintiff for past pain and suffering, you should consider any pain and suffering, mental anguish and apprehension, sorrow and anxiety plaintiff has endured from the time of the incident up to the present time. There is no exact standard for deciding how much to award plaintiff for these damages. Your award should be fair and just in light of the evidence.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.23 (2005 rev.) (modified); Court Standard Jury Instructions. The Seventh Circuit Jury instruction was used as the "base" instruction for the purposes of underlining and deleting material, whereas the substance of the "pain and suffering" instruction comes from the Court's standard jury instructions.

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instructions.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 9/28/12]

10-cv-832-bbc

MICHAEL B. KINGSLEY,

Plaintiff,

v.

ROBERT CONROY, STAN HENDRICKSON,
FRITZ DEGNER AND KARL BLANTON,

Defendants.

OPINION and ORDER

Plaintiff Michael Kingsley is proceeding with counsel on claims that defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton used excessive force on him while he was a pretrial detainee, in violation of his rights under the Fourteenth Amendment. A trial is scheduled for October 9, 2012. Now before the court are the parties' motions in limine.

A. Plaintiff's Motions, dkt. #96

1. Motion to exclude evidence of criminal convictions barred by Fed. R. Evid. 609

Plaintiff moves under Fed. R. Evid. 609 to preclude defendants from offering evidence of (1) criminal charges or arrests brought against plaintiff that have

not resulted in a conviction; (2) criminal misdemeanor convictions that do not involve dishonesty; and (3) criminal convictions for which 10 years have elapsed since the date of the conviction or the release from confinement for the conviction. Defendants state in response that they plan to produce evidence of admit only those felony convictions that are less than 10 years old. Therefore, I am granting this motion as unopposed.

2. Motion to exclude collateral details of any admissible convictions

For those felony convictions that are admissible under Rule 609, plaintiff requests that defendants be precluded from providing the details underlying the convictions. I am granting this motion as unopposed.

3. Motion to exclude evidence of other acts, discipline, grievances, lawsuits and threats

Plaintiff seeks to exclude evidence relating to incidents involving plaintiff that occurred at the Monroe County jail both before and after the incident in this case, including all disciplinary incidents involving plaintiff and any threats, grievances and lawsuits plaintiff made or filed that were unrelated to the May 21, 2010 incident at issue. Defendants do not oppose the motion with respect to evidence relating to disciplinary incidents involving plaintiff that occurred after May 21, 2010. However, defendants contend that they are entitled to introduce evidence regarding incidents occurring before this date because those incidents informed defendants' assessment "of the nature and extent of the threat posed by plaintiff's disobedience and resistance on May 21" and their understanding of plaintiff's behavior. Dfts.' Br., dkt. #116, at 2.

I am granting plaintiff's motion, with one exception. Evidence of plaintiff's previous behavior is improper character evidence, unfairly prejudicial and irrelevant to plaintiff's excessive force claim, unless other evidence shows that defendants knew that plaintiff had a history of assaultive or threatening behavior towards jail employees. Because this is an excessive force case, defendants' state of mind is a relevant issue. Thus, defendants are entitled to show the jury that their actions toward plaintiff were not the product of malicious intent, but were based upon their legitimate considerations of staff safety and institutional security and their concern that plaintiff would engage in assaultive behavior. *West v. Love*, 776 F.2d 170, 174-175 (7th Cir. 1985) (plaintiff's prior acts of institutional violence cannot be used to prove he acted in similar fashion in case at hand, but can be used to show state of mind of correction officers to defend against plaintiff's claim of excessive force) (citing *Lataille v. Ponte*, 754 F.2d 33, 36 (1st Cir. 1985)). However, if defendants did not know or had no reason to believe that plaintiff had a history of violent or threatening behavior, evidence of plaintiff's prior discipline is irrelevant to the reasonableness of their actions and state of mind on May 21, 2010. *Geitz v. Lindsey*, 893 F.2d 148, 151 (7th Cir. 1990) ("for the jury to determine the reasonableness of the defendants' actions, it must evaluate the defendants' conduct in light of what the defendants knew at the time of the shooting . . . ."); *McCrary-El v. Shaw*, 992 F.2d 809, 812 (8th Cir. 1993) ("The amount of force reasonably necessary to subdue prisoners is not the same for all prisoners. . . . In other words, the question of excessiveness of force cannot he assessed in a vacuum; it will vary from circumstance to circumstance.").

However, the two examples of previous acts identified by defendants in their response brief are not admissible in any circumstance. Defendants have said that they intend to introduce evidence that in January 2003, plaintiff had to be extracted from his cell and moved to a receiving cell for arguing with staff and that in May 2005, plaintiff had to be extracted for failure to follow inmate rules. Dfts.' Br., dkt. #116, at 2. These prior incidents occurred five and seven years before the incident in this case, and nothing about them suggests that plaintiff acted in a threatening or violent manner that would have caused the defendants to believe that plaintiff posed a greater risk of harm than any other inmate who is being moved to a receiving cell. The incidents suggest only that plaintiff did not always follow orders. Such evidence would merely prejudice the jury and would not be probative of defendants' mental state.

In sum, defendants may introduce evidence of plaintiff's prior bad behavior only if it involved violent or threatening behavior of which defendants were aware. To the extent such evidence exists, defendants are limited to discussing plaintiff's history in general terms and may not refer to specific conduct reports or attempt to introduce them. *West*, 776 F.2d at 175 (evidence admitted for permissible purposes must be "strictly limited to avoid undue prejudice"); *Young v. Rabideau*, 821 F.2d 373, 382 (7th Cir. 1987) (district judge minimized danger of unfair prejudice by prohibiting disciplinary record from being admitted into evidence and permitting only general questions about it).

4. Motion to exclude undisclosed expert testimony

Plaintiff's fourth motion in limine seeks to preclude defendants from using undisclosed expert testimony. I

am denying this motion. Defendants disclosed John Peters as an expert witnesses and filed an expert report prepared by him. Additionally, defendants identified Dr. Aaron Butler, Dr. James Deming and Vicky Bethke as non-retained expert witnesses who may be called to provide expert testimony regarding the care and treatment they provided to plaintiff. Dkt. #100-1. Because defendants' disclosures comply with Fed. R. Civ. P. 26(a) (2), defendants may elicit expert testimony from these witnesses. Defendants state that they do not intend to elicit expert testimony from any other witnesses. Thus, plaintiff's motion to exclude undisclosed expert testimony is unnecessary.

5. Motion to permit plaintiff to appear at trial in street clothes and without restraints

Plaintiff's final request is that he be permitted to appear at trial in street clothes and without handcuffs or leg shackles. Defendants do not oppose the motion and I will grant it. However, it is the responsibility of plaintiff's counsel to insure that plaintiff has access to street clothes for use during trial.

B. Defendants' Motions, dkt. #89

1. Motion to exclude or limit testimony from plaintiff's expert Brian Landers

Plaintiff identified Brian Landers as an expert witness who will testify about whether defendants' use of force was excessive. Defendants have moved under Fed. R. Evid. 702 to preclude Landers from testifying, contending that he lacks the necessary qualifications and experience to offer expert testimony. In the alternative, defendants argue that Landers' testimony should be substantially limited as unreliable, irrelevant or prejudicial.

a. Landers' qualifications

Specifically, defendants contend that Landers is unqualified because he has never worked as a corrections officer, has never conducted any corrections training or taught any course at the state-mandated corrections training academy and has never taught using the Wisconsin Principles of Subject Control Manual, the manual used to teach corrections officers in Wisconsin.

In determining whether an expert is qualified to render an opinion in a given area, courts "should consider a proposed expert's full range of practical experience as well as academic or technical training." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). After reviewing Landers' expert report and affidavit, I conclude that Landers has sufficient academic and technical training as well as practical experience to qualify as an expert on the use of force in a county jail. Landers worked as a police officer for many years, and his duties included transporting offenders to and from jail, booking offenders, working with jail staff and managing a Wisconsin Dells' holding cell that operated as a temporary jail. Although defendants contend that Landers' experience as a police officer and manager of a holding cell is too different from that of deputies working in a jail setting, they do not explain why that is so. According to Landers, as a police officer, he received training and had duties similar to that of deputies working in a jail setting.

With respect to his academic and technical training, Landers has a degree in Criminal Justice Administration and has taught criminal justice and law enforcement training for several years. In his current position at Madison College, he administers

all law enforcement and jail training academies, as well as specialized training for law enforcement, corrections, dispatching and public safety. The largest client of the police academy is Dane County, whose employees work at the Dane County jail. From this, I infer that Landers is knowledgeable about jail settings and has taught officers working in jail settings. Landers personally teaches a wide variety of courses within the police academy, including specialized training classes on defensive tactics, firearms, tactical response and ethics. His primary teaching experience includes training others using the Wisconsin Defensive and Arrest Tactics Manual. Although defendants contend that the Defensive and Arrest Tactics Manual used by law enforcement officers is different from the Principles of Subject Control Manual used by corrections officers, they do not explain what the differences are or why they matter. According to Landers, both manuals are based on the Wisconsin Disturbance Resolution Model and share substantially the same content. In particular, Landers states that the physical control tactics in both manuals are virtually identical in theory, concept and application. I conclude that Landers is an expert on the subject at issue in this case, and possesses the requisite training, education and experience to testify about the appropriate use of force in a jail setting.

b. Defendants' request to exclude specific portions of Landers' testimony

Defendants contend that if Landers' is not precluded from testifying completely, his testimony should be limited substantially under Fed. R. Evid. 402, 403 and 702. Specifically, defendants seek to preclude Landers from testifying that (1) plaintiff's version of events is credible or possible; (2) defendants applied the

handcuffs to plaintiff incorrectly; (3) the video footage supports his conclusions; (4) the officers could have waited for plaintiff to calm down rather than use the taser; and (5) defendants failed to comply with Wis. Admin. Code DOC § 350.14.

I am denying most of defendants' requested limitations. I agree with defendants that Landers may not testify that plaintiff's version of events is "credible" because that is a question for the jury. *Goodwin v. MTD Products, Inc.*, 232 F.3d 600, 609 (7th Cir. 2000) ("[C]redibility questions are within the province of the trier of fact, in this case a jury."). However, Landers may testify that the evidence supports plaintiff's version of events. In his report, Landers considered plaintiff's allegation that he was not fighting or struggling with the officers, but rather that he may have "tensed up" because the handcuffs kept getting tighter and because defendant Hendrickson put his weight on plaintiff. Landers concluded that plaintiff's testimony was consistent with the evidence he reviewed. In particular, Landers concluded from reviewing the incident reports and the video that the handcuffs could have been tightening because they were not applied correctly. This testimony is admissible and would be helpful to the jury in determining whether to believe plaintiff. It does not go to whether plaintiff is credible, but rather whether plaintiff's version of events is possible. *Smith*, 215 F.3d at 718-19 ("Where an expert's hypothetical explanation of the possible or probable causes of an event would aid the jury in its deliberations, that testimony satisfies *Daubert*'s relevancy requirement."); *Walker v. Soo Line Railroad Co.*, 208 F.3d 581, 587 (7th Cir. 2000) (expert's "testimony could assist the trier of fact even if he cannot say with complete certainty that

electrical trauma caused Mr. Walker's decline in functioning").

On a related issue, I conclude that Landers may also testify about whether the handcuffs were applied to plaintiff properly, though he may not give the opinion that the use of handcuffs was unreasonable or constituted excessive force. As explained more fully below, this testimony about the application of the handcuffs is relevant to plaintiff's explanation of why he may have been "tensed up" in the receiving cell and whether defendants knew that plaintiff was reacting because he was in pain, rather than because he was resisting orders.

I will not preclude Landers from referring to the video footage during his testimony. Although defendants argue that the jury is capable of deciding what was happening on the video, Landers used the video footage to form his opinions and he may use the video footage to explain the bases for those opinions. Otherwise, it would be difficult for Landers to explain exactly why he believes it was unreasonable for defendants to use the taser on plaintiff.

Further, I will not preclude Landers from testifying that there was no "pressing hazard" that would have prevented defendants from properly handcuffing plaintiff, backing off in the receiving cell or using a lower level of force. As an initial matter, defendants have never suggested that there was a "pressing hazard" that prevented them from handling the situation differently. Thus, Landers' opinion is based on defendants' own description of the circumstances. Moreover, although defendants argue that Landers is unqualified to offer an opinion about what may or may not be a pressing concern in a jail, I have concluded already that Landers is qualified to testify about

issues that arise in a jail setting and whether defendants could have used an alternative method of dealing with plaintiff.

Defendants object to the references to and interpretation of Wis. Admin. Code § DOC 350.14, titled "Use of force," in Landers' expert report, contending that Landers is unqualified to offer his interpretation of that provision. I agree with defendants. Landers may not offer his opinion about the meaning of a state regulation. Not only is it inappropriate for experts to provide interpretation of the law, but the interpretation of that provision is irrelevant to this case. *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008) (affirming exclusion of expert testimony about meaning of statutes and regulations, stating "[t]hat's a subject for the court, not for testimonial experts"). Plaintiff has not sued defendants for violation of that particular regulation, which means that it is not necessary to determine whether defendants complied with it. The issue in this case is whether defendants' use of force was so excessive that it violated the Constitution. It will be confusing to the jury if the parties start arguing about whether defendants complied with particular provisions of state law. Landers may rely on his own education, experience and the principles he uses in his teaching to offer opinions about whether defendants' use of force was excessive under the circumstances.

c. Landers' conclusion that defendants' use of force was "unreasonable"

Finally, defendants contend that Landers' opinions should be excluded because they are based on the incorrect legal standard. In his expert report, Landers concludes that defendants' use of force was "unreasonable" under the test set forth in *Graham v.*

Connor, 490 U.S. 386, 397 (1989). In that case, the Supreme Court considered whether a police officer's exercise of force during an investigatory stop was excessive under the Fourth Amendment. *Id.* at 394. Defendants contend that because this case falls under the Fourteenth Amendment, Landers applied the incorrect standard, making his conclusions unreliable and irrelevant. Plaintiff disagrees, contending that Landers applied the correct standard to plaintiff's claim.

As an initial matter, regardless what the standard is, Landers may not offer opinions about the applicable law or factors that should be considered by the jury. Also, plaintiff may not ask Landers his opinion about whether defendants violated the Constitution under any test. The correct legal standard is a question for the court and whether defendant violated the law is a question for the jury.

Although the parties are arguing about Landers' opinions, their dispute is really about the standard that should be applied to plaintiff's excessive force claim. Defendants contend that the correct standard is the standard for excessive force under the Eighth Amendment, which requires plaintiff to show more than an "unreasonable" use of force. Under the Eighth Amendment, a plaintiff must show that defendants used force "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). In other words, unlike the Fourth Amendment test, the Eighth Amendment test requires plaintiffs to prove that the defendants had a particular underlying intent or motivation. On the other side, plaintiff contends that

because he was a pretrial detainee covered by the due process protections of the Fourteenth Amendment, rather than the Eighth Amendment, his claim should be covered by a more lenient standard.

The status of a pretrial detainee falls somewhere between the status of a free citizen, governed by the Fourth Amendment's "objective reasonableness" standard, and a convicted prisoner," governed by the "cruel and unusual punishment" or "unnecessary and wanton infliction of pain" standard of the Eighth Amendment. *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996) (citations omitted). Plaintiff is correct that because he was a pretrial detainee who had not been convicted and sentenced at the time he alleges his constitutional rights were violated, his claim is governed by the due process protections of the Fourteenth Amendment. *Forrest v. Prine*, 620 F.3d 739, 743 (7th Cir. 2010); *Estate of Moreland v. Dieter*, 395 F.3d 747, 758 (7th Cir. 2005). As the court of appeals has explained in a similar context:

> The scope of an individual's right to be free from punishment—and, derivatively, the basis for an excessive force action brought under § 1983—hinges on his status within the criminal justice system. On one end of the spectrum are sentenced prisoners. The Eighth Amendment protects these individuals only from the infliction of cruel and unusual punishment, which is often defined in the prison context as the unnecessary and wanton infliction of pain.
>
> Pretrial detainees, by contrast, have not been convicted or sentenced and thus are not yet punishable under the law. As such, pretrial detainees couch excessive force claims as violations of their Fourteenth Amendment rights

> to due process, not infringements on the Eighth Amendment's ban on cruel and unusual punishment.

Forrest, 620 F.3d at 744 (quoting *Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009) (internal quotation marks and citations omitted)), Unfortunately, "the exact contours of any additional safeguards remain undefined" by the Supreme Court or the Court of Appeals for the Seventh Circuit. *Lewis*, 581 F.3d at 474; *Wilson*, 83 F.3d at 875 ("Whether the standard for excessive force claims is the 'reasonableness' standard of the Fourth Amendment, or some other intermediate standard, the Supreme Court has declined to say."). The court of appeals has stated only that "[t]he Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment." *Forrest*, 620 F.3d at 744.

Defendants cite *Forrest* and *Lewis*, in which the court of appeals applied Eighth Amendment standards to analyze the Fourteenth Amendment excessive force claims of pretrial detainees. However, the court noted specifically that the plaintiffs in those cases had not argued for a different standard. *Id.* ("Mr. Forrest has not explained, however, how any protections guaranteed by the Fourteenth Amendment provide him with more protection than he would receive under traditional Eighth Amendment standards. We therefore shall borrow Eighth Amendment standards to analyze Mr. Forrest's Fourteenth Amendment section 1983 claim."); *Lewis*, 581 F.3d at 475 (refusing to consider, absent the parties' raising the issue, "any safeguards the Fourteenth Amendment provides beyond those it

shares with the Eighth Amendment"). Similarly, in the summary judgment opinion in this case, I applied Eighth Amendment standards, noting that "[n]either plaintiff nor defendants have identified any protections guaranteed by the Fourteenth Amendment that would have provided plaintiff more protection than he would have received under traditional Eighth Amendment standards." Dkt. #69 at 10-11.

Now that plaintiff has counsel, he presents a persuasive argument that his Fourteenth Amendment excessive force claim should be governed by a more protective standard than the Eighth Amendment standard. Plaintiff cites *Wilson*, 83 F.3d 870, a Fourteenth Amendment pretrial detainee case, in which the court of appeals upheld the use of jury instructions borrowed from Fourth Amendment arrestee cases and noted that "'most of the time the propriety of using force on a person in custody pending trial will track the Fourth Amendment.'" *Id.* at 875-76 (quoting *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990)). However, the court went on to explain that whether defendants' conduct was unreasonable is only one part of the test for claims under the Fourteenth Amendment. Unlike Fourth Amendment claims, claims under the Fourteenth Amendment are not governed by a "wholly objective" test. *Id.* at 875. The factfinder must also determine whether the defendants acted with "reckless disregard" of the plaintiff's rights. *Id.* (citing *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988)). This standard is still more protective than the Eighth Amendment standard, because it does not require the plaintiff to prove that the defendants acted "maliciously and sadistically for the very purpose of causing harm."

In *Wilson*, the court of appeals concluded that the more protective standard was appropriate under the plaintiff's version of the facts, which were that a corrections officer threw him to the floor after the plaintiff laughed at him and a struggle between the two ensued. *Id.* at 872, 876. However, the court went on to explain that, in cases in which a guard was attacked in a prison and was acting in self-defense, the Eighth Amendment standard would arguably supplant the Fourth Amendment one. *Id.* at 876.

Defendants make no argument why the stricter Eighth Amendment standard should apply and why plaintiff's claim would fall under the prison disturbance scenario discussed in *Wilson*. After reviewing the allegations in this case and the case law, I am not convinced that the Eighth Amendment standard applies. The evidence in the record at this stage shows at most that plaintiff refused to relax his body and that defendants used a taser to gain his compliance. There was no "prison disturbance" under the meaning of *Wilson*. Thus, it is appropriate to apply the standard upheld in *Wilson* and consider whether defendants acted with reckless disregard for plaintiff's rights and behaved unreasonably "in light of the facts and circumstances." *Id.* at 875. *See also Richardson v. Jones*, 1:10-CV-01015, 2011 WL 31533 (W.D. Ark. Jan. 5, 2011) ("The courts generally analyze excessive force claims of pretrial detainees in the same way as those of arrestees" and consider "whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them."); *Black v. Carey*, 07-CV-3317, 2010 WL 431916 (C.D. Ill. Jan. 29, 2010) (applying standard from *Wilson* and rejecting Eighth Amendment standard in excessive force case involving pretrial detainee); *Bonnin v. Eau Claire County*, 03-C-0065-C, 2004 WL 67478 (W.D. Wis. Jan. 13, 2004) ("In

determining whether force was excessive [under Fourteenth Amendment], the guiding inquiry is whether officials behaved in a reasonable way in light of the facts and circumstances confronting them. ").

Because the proper inquiry asks, in part, whether defendants' conduct was reasonable, Landers' opinions in his expert report about the reasonableness of defendants' actions under the circumstances are relevant and admissible. In forming his opinions, Landers considered factors that are relevant to the Fourth, Eighth and Fourteenth Amendment standards, including the need for force, the potential threat to officers and whether plaintiff was resisting or attempting to escape. *Wilson*, 83, F.3d at 876. Therefore, I will not preclude Landers from testifying as to these issues.

2. Motion to preclude plaintiff from introducing evidence that he was improperly handcuffed

At summary judgment, I dismissed plaintiff's claim that defendants used excessive force against him when they handcuffed him, pulled him off his bunk and carried him to the receiving cell. The only remaining claim relates to what happened after plaintiff was in the receiving cell. Defendants contend that the handcuffing is irrelevant to what happened in the receiving cell and thus, plaintiff should be precluded from introducing evidence and arguing that he was improperly handcuffed.

I am denying the motion. Plaintiff does not intend to argue that the handcuffing constituted excessive force, and such an argument would be improper. However, plaintiff intends to testify that the only reason he was "tensing" his body in the receiving cell was because the handcuffs were applied improperly and were too tight,

and not because he was "resisting." Plaintiff also intends to argue that defendants knew or should have known that plaintiff was in pain and not resisting. Plaintiff's expert, Brian Landers, plans to testify that plaintiff's version of events is possible because defendants' failure to use the safety lock on the handcuffs may have caused the handcuffs to tighten and plaintiff to tense up. This testimony is relevant to the events in the receiving room and will not be precluded.

3. Motion to preclude plaintiff from introducing evidence relating to his carpal tunnel syndrome in the damages phase of trial

Defendants move to preclude plaintiff from introducing evidence that the handcuffs used to restrain him during the incident in question caused him to develop carpal tunnel syndrome. At his deposition, plaintiff testified that he believed that to be the case. However, neither plaintiff's doctors nor any other witness disclosed in the case has offered testimony to support plaintiff's theory, and plaintiff states in his brief in response to defendants' motion in limine that he will not argue this theory. Plt.'s Br., dkt. #121, at 20. Therefore, I am granting defendants' motion as unopposed.

This ruling does not prevent plaintiff from arguing that the handcuffs exacerbated his carpal tunnel syndrome and contributed to any "tension" that he exhibited in the receiving cell if this is the case. Defendants' motion in limine does not address this theory, but I warn plaintiff that he may not offer testimony along these lines unless he has evidence from a medical expert to support his theory that handcuffs may exacerbate carpel tunnel syndrome or that his carpal tunnel syndrome could cause him to

tense up. Plaintiff's personal speculation about his carpal tunnel syndrome is not sufficient.

4. Motion to preclude plaintiff from arguing at trial that the taser was excessive because it failed to gain his compliance

Plaintiff contends that defendants had no good reason to tase him in the receiving cell because he was handcuffed on a bunk and presented no threat to defendants. He contends that defendants' actions immediately after tasing him confirm that the taser was unnecessary and used maliciously. In particular, after defendants tased plaintiff, he continued be unresponsive and defendants could not remove his handcuffs. Defendants exited the receiving cell and left plaintiff handcuffed on the cell bunk for several minutes. Plaintiff intends to argue that instead of tasing him, defendants could have let him lie on the bunk until he calmed down. Defendants contend that this line of argument should be precluded because it relies on "hindsight," instead of considering what the officers knew at the time they used the taser.

Defendants' argument is not persuasive. Factors relevant to determining whether force was excessive under the Fourteenth Amendment include (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of injury suffered; (4) any threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response. *Wilson*, 83 F.3d at 876 (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The actions that defendants took after tasing plaintiff are directly relevant to the first, second and fourth factors. Plaintiff may present evidence and argument on this issue.

5. Motion to permit defendants to impeach plaintiff with evidence of his prior criminal convictions under Fed. R. Evid. 609

Defendants intend to impeach plaintiff using six prior felony convictions that are less than 10 years old. These convictions are:

(1) an October 14, 2011 conviction for possession of cocaine with intent to manufacture, distribute or deliver, in violation of Wis. Stat. § 961.41(1m) (cm) (1r);

(2) an October 3, 2008 conviction for manufacture, distribution or delivery of cocaine in violation of Wis. Stat. § 961.41(1) (cm) (1g);

(3)-(5) October 16, 2006 convictions for possession of THC with intent to manufacture, distribute or deliver in violation of Wis. Stat. § 961.41(1m) (h) (1), and for two counts of bail jumping in violation of Wis. Stat. § 946.49 (1) (b); and

(6) a July 14, 2005 conviction for possession of THC in violation of Wis. Stat. § 961.41 (3g)(e).

Defendants contend that these convictions are probative of plaintiff's truthfulness, while plaintiff contends that any probative value of these convictions is substantially outweighed by the danger of unfair prejudice to plaintiff and needlessly presenting cumulative evidence. For the most part, I agree with plaintiff. The jury will know already that the facts relevant to this case occurred while plaintiff was a detainee in a county jail and that plaintiff is now a prisoner in the custody of the Department of Corrections. Thus, they are aware that plaintiff has been convicted of crimes and may consider whether that affects his credibility. Additionally, the probative

value of the nature of the convictions is substantially outweighed by the potential for unfair prejudice under Rule 403. Accordingly, defendants may ask plaintiff how many felony convictions he has received in the past 10 years, but they cannot ask plaintiff (or any other witness) to describe the nature of those convictions.

6. Motion to preclude plaintiff from introducing evidence regarding the fact that plaintiff was referred to the Monroe County District Attorney's Office for criminal charges relating to the incident in question and the results of the referral

After the May 21, 2010 incident, the Monroe County Sheriff's Department referred plaintiff to the Monroe County District Attorney's office for possible criminal charges. The District Attorney's office brought misdemeanor charges against plaintiff for obstructing or resisting an officer and for disorderly conduct. The charges were later dismissed by the prosecutor. Defendants contend that any testimony or evidence relating to the charges and their dismissal should be precluded. I agree. The charges and their subsequent dismissal are irrelevant to the issues in this case and both parties will be precluded from discussing them at trial. Therefore, I am granting this motion.

7. Motion to preclude plaintiff from introducing evidence relating to other instances in which defendants or other Monroe County Sheriff's Department employees have used a taser

Before May 21, 2010, each of the defendants had been involved in incidents in which a taser had been used against prisoners at the Monroe County Jail. Defendants have moved to preclude plaintiff from introducing evidence about such incidents, contending

that such evidence is improper character evidence under Rule 404(b), is irrelevant and would be confusing and unfairly prejudicial.

I am denying the motion in large part. I agree with defendants that plaintiff should be precluded under Rule 404(b)(1) from offering evidence that defendants have used a taser on other prisoners, if plaintiff's purpose is to argue that defendants have a propensity for tasing prisoners unnecessarily. However, plaintiff states that he does not intend to offer such evidence for that purpose and does not plan on arguing that defendants' treatment of him was somehow in character for them. Rather, plaintiff says that the evidence is relevant under Rule 404(b)(2), which allows evidence of prior acts to prove "motive, opportunity, intent . . . absence of mistake, or lack of accident." Plaintiff intends to argue that defendants have *never* tased a prisoner at Monroe County jail who was handcuffed and in circumstances similar to those in this case; instead, defendants tase only those prisoners who are exhibiting violent or aggressive behavior. Plaintiff contends that this evidence is relevant to defendants' motivations in tasing him and in the reasonableness of their actions, particularly because defendants have argued that they acted in accordance with their experience and training.

Because plaintiff does not intend to use the evidence to argue that defendants "acted in accordance with [their] character" when they tased him, the evidence of defendants' prior acts involving tasers is not barred by Rule 404(b)(1). Additionally, I agree with plaintiff that the evidence is relevant to defendants' motivations in tasing plaintiff.

The question remains whether such evidence should be precluded as confusing and unfairly prejudicial.

Defendants contend that evidence of other incidents at the jail involving tasers will distract the jury and cause them to focus on whether the use of force was justified in those other situations. Defendants' concerns are legitimate. However, the potential confusion and prejudice can be controlled by limiting the evidence and questioning regarding prior taser incidents to a few brief questions. Plaintiff may ask defendants how many times or how frequently they have used a taser and under what kinds of circumstances. In addition, plaintiff may ask defendants whether they have used a taser on an inmate or offender who was handcuffed or otherwise restrained and to briefly describe the circumstances of those particular situations only. I will not permit this line of questioning to lead to mini-trials regarding defendants' use of tasers in other incidents. With this caveat, I am denying defendants' motion.

8. Motion to preclude plaintiff from introducing evidence relating to prior discipline imposed on defendants by the Monroe County Sheriff's Department

Defendants Controy, Blanton and Degner have each been disciplined in the past by the Monroe County Sheriff's Department. Defendants have moved to preclude plaintiff from introducing evidence regarding this prior discipline, arguing that it is irrelevant, unduly prejudicial and improper character evidence.

Plaintiff states that he does not intend to introduce evidence regarding Conroy's or Blanton's disciplinary record. However, plaintiff argues that he should be able to introduce evidence that defendant Degner was disciplined by the Monroe County Sheriff's Department for (1) using sick leave for an absence when he was actually working for an outside private

employer without permission and (2) writing checks on a bank account with insufficient funds.

I am granting defendants' motion to preclude this evidence. Under Rule 608(b), courts may allow counsel to inquire about specific instances of a witness's conduct if they are "probative of the character for truthfulness or untruthfulness" of the witness. However, it is not clear from the facts in the record that the prior instances involving defendant Degner are particularly probative of his honesty or dishonesty. Degner contends that he was not dishonest with the Sheriff's Department regarding the missed shift because he was actually injured when he used the sick leave. With respect to the bad checks, he contends that he had a misunderstanding with his wife about how much money was in his bank account and that, as soon as he discovered the problem, he rectified it immediately with the recipients of the bad checks. To the extent there is any probative value to these instances of prior misconduct, the probative value is outweighed by the risk that the evidence would waste the time of the jury, confuse the issues and unfairly prejudice defendant Degner. Thus, I will preclude it.

9. Motion to preclude plaintiff from presenting any evidence that defendants may be covered by insurance in this case

Defendants are covered by Monroe County's insurance policy with Wisconsin County Mutual Insurance Company, subject to any terms, conditions and exclusions of the policy. Defendants have moved to preclude plaintiff from presenting any evidence of the insurance coverage to the jury.

I am granting this motion. The evidence is irrelevant. Under Fed. R. Civ. P. 411, "[e]vidence that

a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully." Neither side should make any reference to defendants' ability to pay damages or to what entity will ultimately pay damages.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Kingsley's motions in limine, dkt. #96, are GRANTED IN PART and DENIED IN PART as follows:

a. The motion to exclude evidence of criminal convictions barred by Fed. R. Evid. 609 is GRANTED.

b. The motion to exclude collateral details of any admissible convictions is GRANTED.

c. The motion to exclude evidence of other acts, discipline, grievances, lawsuits and threats is GRANTED, with the exception that defendants may introduce evidence, if such evidence exists, that they were aware that plaintiff had a history of assaultive or threatening behavior towards jail staff.

d. The motion to exclude undisclosed expert testimony is DENIED as unnecessary.

e. The motion to permit plaintiff to appear at trial in street clothes and without restraints is GRANTED.

2. The motions in limine filed by defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton, dkt. #89, are GRANTED IN PART and DENIED IN PART as follows:

a. The motion to exclude testimony from plaintiff's expert Brian Landers is DENIED, with the exception that Landers may not give an opinion about plaintiff's

credibility, may not offer an interpretation of Wis. Admin. Code § DOC § 350.14 and may not make legal conclusions.

b. The motion to preclude plaintiff from introducing evidence that he was improperly handcuffed is DENIED.

c. The motion to preclude plaintiff from introducing evidence relating to his carpal tunnel syndrome in the damages phase of trial is GRANTED.

d. The motion to preclude plaintiff from arguing at trial that the taser was excessive because it failed to gain his compliance is DENIED.

e. The motion to permit defendants to impeach plaintiff with evidence of his prior criminal convictions under Fed. R. Evid. 609 is GRANTED IN PART and DENIED IN PART. Defendants may ask plaintiff whether he has been convicted of a felony in the past 10 years, but they cannot ask plaintiff (or any other witness) to describe the nature or number of those convictions.

f. The motion to preclude defendants from introducing evidence regarding the fact that plaintiff was referred to the Monroe County District Attorney's Office for criminal charges relating to the incident in question and the results of the referral is GRANTED.

g. The motion to preclude plaintiff from introducing evidence relating to other instances in which defendants or other Monroe County Sheriff's Department employees have used a taser is GRANTED IN PART and DENIED IN PART. Plaintiff may introduce evidence regarding prior taser incidents for the purpose of showing the reasonableness and motivations of defendants' actions

toward plaintiff, but may not introduce prior taser incidents for the purpose of arguing that defendants acted in accordance with their prior behavior.

h. The motion to preclude plaintiff from introducing evidence relating to prior discipline imposed on defendants by the Monroe County Sheriff's Department is GRANTED.

i. The motion to preclude plaintiff from presenting any evidence that defendants may be covered by insurance in this case is GRANTED.

Entered this 28th day of September, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge

[Filed: 02/13/13]

II. POST-TRIAL INSTRUCTIONS

Introduction

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow *all* of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of 4 questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

Note that certain questions in the verdict are to be answered only if you answer a preceding question in a certain manner. Read the introductory portion of each

question very carefully before you undertake to answer it. Do not answer questions needlessly.

Burden of Proof

When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. On the liability questions in the special verdict, the burden of proof is on the party contending that the answer to a question should be "yes." You should base your decision on all of the evidence, regardless which party presented it.

Answers Not Based on Guesswork

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party having the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible evidence from which you can find the existence of the facts that the party must prove in order to satisfy the burden of proof on the question under consideration. In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless who introduced it.

Number of Witnesses

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a large number. You need not accept the testimony of the larger number of witnesses.

All Persons Equal Before the Law

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

Impeachment by Conviction of Crime

You have heard evidence that plaintiff Michael Kingsley has been convicted of crimes. You may use that evidence to help you decide whether plaintiff's testimony is truthful and how much weight to give his testimony. You may not consider this evidence for any other purpose.

Multiple Defendants

You must give separate consideration to each claim and each party in this case. Although there are four defendants, it does not follow that if one is liable, any of the others is also liable. In considering a claim against a defendant, you must not consider evidence admitted only against other defendants.

Special Verdict Questions

Plaintiff alleges that defendants used excessive force against him.

Question No. 1 asks whether on May 21, 2010, any or all defendants used excessive force against plaintiff.

Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:

(1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances of the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff but they proceeded to act in disregard of plaintiff's safety and failed to take adequate steps to minimize the harm or risk of harm to plaintiff; and

(4) Defendants' conduct caused harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.

If you find that plaintiff has proved each element of his excessive force claim by a preponderance of the evidence with respect to one or more defendant, you

should answer "Yes" in the appropriate space in Question No. 1. Then proceed to Question No. 2.

If, on the other hand, you find that plaintiff has failed to prove any element of his excessive force claim by a preponderance of the evidence with respect to one or more defendants, you should answer "No" in the appropriate space in Question No. 1. If you answer "No" as to all defendants in Question No. 1, you should not consider any more questions.

Damages Questions

Questions Numbers 2, 3 and 4 involve the issue of damages. If you answer "Yes" to Question No. 1 for one or more defendants, then you must answer Question No. 2 and Question No. 3 for those defendants.

Compensatory damages

Question No. 2 asks what amount of money, if any, will fully and fairly compensate plaintiff for the harm caused by defendants. These are called "compensatory damages."

Plaintiff has the burden of convincing you, by the preponderance of the evidence, both that he has been injured or damaged and the amount of the damages. This does not mean, however, that plaintiff must produce evidence that is as exact as the evidence needed to support findings on other questions in the verdict. Determining damages involves the consideration of many different factors that cannot be measured precisely. In determining the damages you must base your answer on evidence that reasonably supports your determination of damages under all of the circumstances of the case.

Compensatory damages are not restricted to the actual loss of money; they include both the physical

and mental aspects of injury, even if these are not easy to measure. You should consider the physical, mental and emotional pain and suffering that plaintiff has experienced.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine the amount of the damages sustained from the evidence you have seen and heard. Examine that evidence carefully and impartially. Do not add to the damage award or subtract anything from it because of sympathy to one side or because of hostility to one side. Do not make any deductions because of a doubt, in your minds about the liability of any of the parties.

Income Taxes

You must not add to any award of damages any money to compensate the plaintiff for state or federal income taxes. Damages received as an award for personal injuries are exempt from income taxes. On the other hand, you must not subtract any money from your award of damages just because the plaintiff is not required to pay income taxes.

Punitive Damages

Question No. 3 asks whether one or more defendants acted in a way that demonstrated a willful or reckless disregard for plaintiff's rights. If you answered "yes" to Question No. 4 with respect to either or both defendants, you may award punitive damages in *Question No. 4* against those defendants.

Punitive damages are never a matter of right. This means that you are not required to make any award of

punitive damages, but you may do so if you think it is proper under the circumstances. It is in the jury's discretion to award or withhold them.

Punitive damages may be awarded even if the violation of plaintiff's rights resulted in only nominal compensatory damages. That is, you may award punitive damages even if the plaintiff can show no damages or other injury as a result of defendants' actions.

The purposes of punitive damages are to punish the defendants for their conduct and to serve as an example or warning to the defendants and others not to engage in similar conduct in the future. Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against defendants.

You may assess punitive damages only if you find that the conduct of at least one of the defendants was in reckless disregard of plaintiff's rights. An action is in reckless disregard of plaintiff's rights if under the circumstances, it reflects complete indifference to plaintiff's safety or rights. If you find that a defendant's conduct was motivated by evil motive or intent, such as ill will or spite or grudge either toward plaintiff individually or toward all persons such as plaintiff, then you may find that the defendant deliberately violated the plaintiff's rights. In addition, if the defendant was in a position in which he certainly should have known that his conduct would violate the plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to the plaintiff, then that defendant acted with reckless disregard for the plaintiff's rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of defendants' conduct;
- the impact of defendants' conduct on plaintiff;
- the relationship between the plaintiff and defendants;
- the likelihood that defendants would repeat the conduct if an award of punitive damages is not made; and
- the relationship of any award of punitive damages to the amount of actual harm the plaintiff suffered.

Selection of Presiding Juror; Communication with the Judge; Verdict

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror. This person will help to guide your discussions in the jury room.

You are free to deliberate in any way you decide or select whomever you like as a presiding juror. When thinking about who should be presiding juror, you may want to consider the role that the presiding juror usually plays. He or she serves as the chairperson during the deliberations and has the responsibility of insuring that all jurors who desire to speak have a chance to do so before any vote. The presiding juror

should guide the discussion and encourage all jurors to participate. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors. Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.

Once you are in the jury room, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree.

When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return with the verdict into the courtroom.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 10/03/12]

10-cv-832-bbc

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

PRETRIAL CONFERENCE ORDER

A final pretrial conference was held in this case on October 2, 2012, before United States District Judge Barbara B. Crabb. Plaintiff appeared by Edward Pardon, Wendy Ward and Joel Graham. Defendants appeared by Andrew Jones and Timothy Posnanski.

Counsel predicted that the case would take 3 days to try. They understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon. The jury will be selected on Tuesday, October 9, 2012 by United States Magistrate Judge Stephen Crocker.

Counsel agreed to the voir dire questions in the form distributed to them at the conference and to adding four witnesses (Robert Conroy, Karl Blanton, Nicholas Manka and John Peters) to the list of prospective

witnesses included in the voir dire. The jury will consist of eight jurors to be selected from a qualified panel of fourteen. Each side will exercise three peremptory challenges against the panel. After the jury is selected, the magistrate judge will read the introductory instructions to the jury.

Counsel agreed that with the exception of experts, all witnesses would be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for instruction on the system.

No later than noon on October 12, 2012, plaintiff's counsel will advise defendants' counsel of the witnesses plaintiff will be calling on Monday and the order in which they will be called. Counsel should give similar advice at the end of each trial day; defendants' counsel shall have the same responsibility in advance of defendants' case. Also, no later than noon on October 12, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel are to provide copies of documentary evidence to the court before the start of the first day of trial.

Counsel discussed the form of the verdict and the instructions. Final decisions on the instructions and form of verdict will be made at the instruction conference at the close of evidence.

The parties have stipulated to the dismissal of plaintiff's state law claim for assault and battery and plaintiff's § 1983 claims against Robert Conroy and Karl Blanton and the removal of defendant Lisa Josvai and Patricia Fish from the suit and the court has signed an order to that effect. The voir dire, verdict form and instructions have been amended to reflect these changes.

Defendants renewed their request to have the jurors informed that Monroe County is not a party to plaintiff's suit. After considering this request again, I am persuaded that doing so is not necessary to protect the county's rights.

Defendants asked for clarification of the discrepancy in the court's order on the motions in limine. The ruling in the "Order" portion at p. 24 stands: defendants may ask plaintiff whether he has a prior conviction; they may not ask him how many prior convictions he has.

Both sides have stated objections to the proposed instruction on excessive force. For now, I am leaving it as is, with the exception of a change to subsection (3). That subsection will read: "Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm.

In addition, I have added an instruction about nominal damages to the instruction on compensatory damages.

Entered this 3d day of October 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF JURY TRIAL HELD BEFORE THE HONORABLE JUDGE BARBARA B. CRABB

October 15, 2012
9:00 a.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould, P.C.
BY: EDWARD PARDON
WENDY WARD
JOEL GRAHAM
10 East Doty Street, Ste. 600
Madison, Wisconsin 53703

Julie King, Paralegal

For the Defendants: Whyte Hirschboeck Dudek, S.C.
BY: ANDREW JONES
TIMOTHY POSNANSKI
555 East Wells, Ste. 1900
Milwaukee, Wisconsin 53202

* * *

[2-A-43] moved away or do you want to stand there for questioning?

MR. PARDON: I will stand at the lectern.

THE COURT: Okay.

MR. PARDON: Your Honor, we call plaintiff Michael Kingsley.

THE COURT: Please come forward to be sworn.

MICHAEL KINGSLEY, PLAINTIFF, SWORN

THE CLERK: Please have a seat and be sure to speak right into the microphone.

DIRECT EXAMINATION

BY MR. PARDON:

Q Good morning.

A Good morning.

Q Could you please state your name?

A My name is Michael Brandon Kingsley.

Q And, Mr. Kingsley, could you tell us briefly a little bit about yourself?

A Yes. I'm 31 years old. I was born and raised here in Madison, Wisconsin. I'm not married. I have no children. I attended and graduated from Madison East High School. I've held several jobs. More recently I worked as an auto detailer and a car salesman. And I

eventually got into trouble with the law and I got—currently I'm serving a three-year sentence at this time for a drug crime. And I don't know, I'm currently [2-A-44] incarcerated at this time.

Q Okay. When are you scheduled to be released?

A I currently have a little less than two years left to do.

Q Okay. What are you planning on doing when you get out?

A Basically just take it one day at a time. And first I want to try to help my mom out as much as I can. She just recently got diagnosed with --

MR. JONES: Objection. Relevance.

THE COURT: Sustained.

BY MR. PARDON:

Q All right. Have you completed drug rehab?

A I'm currently in two treatment programs at the Wisconsin Resource Center. I'm currently on a waiting list to attend SGIP, which is errors in thinking. And I'm, yeah, I'm just on the waiting list for right now.

Q Okay. While you were awaiting trial for the offense for which you are now incarcerated, where did you reside?

A I was in Monroe County Jail.

Q Okay. I would like to direct your attention to the incident that this lawsuit is about. Did something happen at about ten o'clock on the evening of May 20 that started sort of the events we're talking about today?

A Yes.

[2-A-45] Q Can you describe what happened?

A It was about ten or 10:30 at night. Deputy Manka was performing lockdown of the jail. And he walked past my room that I was in and he noticed there was a paper on a light and he told me to take it off. And I told him I wasn't going to take it off because I didn't put it there. He soon left.

After he came back during his next round, I believe he told me I needed to take the paper off again. I explained to him I didn't put it there again. And he said that he was going to issue me a violation report. And at that time I made a sarcastic remark saying, sounded like a job for the CERT team to come take the paper off the light. And he didn't say anything and he just left after that. Nothing ever happened after that.

Q What is your understanding of what the CERT team—

A It's something like the SWAT team or something, come and have, like, shields, batons, helmets on I guess.

Q Did you get along with Deputy Manka?

A Yes, I did.

Q Did you put the paper over the light?

A No. The paper was there ever since I was in that cell. I was in there for over a month or a month at that time. It was there the whole entire time.

Q Based on your experience being in the Monroe County [2-A-46] Jail, do you know whether inmates sometimes put paper over the light?

A From my conversations with other jail staff members, they said it happens all the time. And like I say, sometimes I think it gets overlooked.

Q During your conversation—your two conversations with Deputy Manka that night or that evening, did you make any threats to him?

A Not at all, no.

Q And did you tell Deputy Manka that if someone came in to take off the paper, you would resist them?

A No, I did not.

Q Did the paper—what happened with the paper that night?

A The paper—paper just stayed on the light like it had been the whole time.

Q What happened the next morning?

A The next morning Sergeant Hendrickson came and asked me if I wanted my medication and I told him I didn't want to take my medication. And he asked me, did I take the paper off the light. I told him again that the paper has been there for I don't know how long. And he said—he repeated again and I think he said, "It's a direct order. I'm telling you to take the paper off the light."

And I didn't respond to him after that. I didn't [2-A-47] want to try to get into an argument with him. So after that, he just left after. I didn't respond to him after he kept on telling me to take the paper off.

Q Okay. Did you make any threats to Sergeant Hendrickson during this conversation or either of them?

A Not at all, no.

Q Did you tell Sergeant Hendrickson, if someone came in to take off the paper that you would resist them?

A No, I didn't.

Q What happened after that?

A After that Lieutenant Conroy came in and he asked me to take the paper off the light. And I told him, you know, the paper had been there for a long time. I don't even know how long it was there. I know it was there the whole time I was in the cell. And I basically told him he was probably in a better position to take the paper off the light because the paper—or the light is, like, in the middle of the cell. And he told me that he would take it off, but since he was taking it off that I would have to go to receiving.

Q What's your understanding or what, as of the time, was your understanding of receiving?

A Receiving is like the *hole* or segregation. You know, it's basically they call it the *hole* because there's a hole in the door. It's basically for [2-A-48] punishment.

Q Okay. Did you make any threats toward Lieutenant Conroy when you spoke with him?

A No, I did not.

Q Did you tell Lieutenant Conroy, if anyone came in to take down the paper you would resist him?

A No. I didn't say anything to him.

Q And would it have been easy for you to take the paper down?

A No. Like I said, the light is in the middle of the cell. And the bed is off attached to the wall, so I would have to, like, get on the bed and then try to jump off and try to simultaneously grab the paper off the light. I figure I'm not going to do that. I'm not saying it's

impossible, I could do it, but I just didn't feel comfortable doing it.

Q What happened after Lieutenant Conroy left after your conversation with him?

A After he left he came back with four other officers: Officer Blanton, Degner, Sergeant Hendrickson and Deputy Shisler, I believe—

Q Okay.

A —I think his name is.

Q And what happened in your interaction with these officers then?

[2-A-49] A Sergeant Hendrickson came up to the cell door and he told me to get up off the bed and put my hands behind my back. And at that time I looked up and I see Deputy Degner. He had, like, a taser. And the taser has, like, a light or a beam on it. And I was, like, woe, you know. I didn't—I was, like, I thought just lay there, don't make any sudden moves because I believe they would have probably tried to justify me getting up or anything like that and they would have tased me.

I figured I didn't do anything wrong. Why do I have to go to the hole? They told me for disobeying orders. And I heard Lieutenant Conroy, I believe he said, "Just put your hands behind your back," so at that time I put my hands behind my back. And I think they made a signal or something and they opened up the door.

Q Okay. When Lieutenant Conroy told you to put your hands behind your back, where were you physically?

A I was laying on the bed facedown.

Q Okay. And then so at that point then what happened?

A They opened up the cell door and Sergeant Hendrickson and Deputy Blanton and Deputy Degner, they entered the cell. And Sergeant Hendrickson, he put his knee into my back and put the handcuffs on extremely tight. And Deputy Blanton, I believe he was holding down or pinning down my legs.

[2-A-50] And they told me to get up. And I don't know, it was kind of hard. I was lying facedown. I had my handcuffs on behind by back. And I told them I couldn't get up, it was kind of hard. And they seemed like they was kind of irritated about it.

And they, in a pulling and dragging motion, they dragged me off the bed. And when they were doing so, my feet slapped—the bed has got a frame on it and my feet slapped the bed frame. And it caused instant pain in my feet and more in my right foot than my left foot.

And I went down to my knees complaining of my foot. And they told me to get up. And I told them I couldn't get up. And I just kept complaining about my foot. And they said, "Get up or we're going to drag you." And I said I couldn't, my foot. I kept complaining about my foot; I remember that. And at that time they just—they drug me out of the cell block.

Q Okay. I'm going to stop you right there and I want to follow up on some other things you said.

A Okay.

Q When the cuffs were placed on you, did you resist Sergeant Hendrickson putting the cuffs on?

A No, I did not.

Q And did you make any threats to any of the deputies while they were putting the cuffs on?

[2-A-51] A No.

Q And then after they sort of picked you up and started to drag you, did you make any threats to anyone while they were doing that?

A Absolutely not.

Q Well, then what happened after that?

A They took me to the—through the cell block and then they have, like, a hallway. And they set me down and then they, the four of them, instead of two, each one grabbed one of my arms and legs and they carried me to the segregation cell.

Q While they were carrying you to the segregation cell, did you make any threats toward anyone?

A No, I did not.

Q Do you have any idea about how long it was or how far it was that they—that they carried you from your cell to the receiving cell?

A I don't know exactly, but maybe 75, 50 feet maybe.

Q What then happened after the officers took you into the receiving cell?

A After they took me into the receiving cell, Sergeant Hendrickson—they laid me down on the bed facedown—Sergeant Hendrickson put his knee into my back, which was pretty painful. And Deputy Blanton was attempting to try to take the handcuffs off. And when he was doing so, he [2-A-52] made the handcuffs even tighter than they were, which was causing me pain and to, like, tense up.

And they kept yelling at me telling to relax, relax. And I was in so much pain, I was groaning and grunting. And then I heard Deputy—Sergeant Hendrickson—it's kind of hard to remember because I hadn't seen the video until, I don't know, like over a year and a half or something like that.

Q Mm-mm.

A And—

Q I want you to talk about what you remember and don't worry about the video today.

A Okay. Sergeant Hendrickson put his knee in my back and they were trying to make the hand—take the handcuffs off and they made them tighter. And I tried—you know, I felt like I was suffocating or it was hard for me to breathe because they had their, like, knee on my back.

And I went to, like, move my head up and, you know, that's when Sergeant Hendrickson slammed my head down and it caused me some pain. And at that time I heard him say, "Tase his ass," and I was shot with the taser in my back, which was extremely painful.

And then I—I think they left, you know. I think I fainted or I don't know if I blacked out or what. I [2-A-53] was in so much emotion and it was kind of hard to just—maybe I was having a panic attack, I don't know. It was just too much for me to deal with and it's kind of hard to remember certain things of what happened.

Q All right. Prior to the time that you heard Sergeant Hendrickson tell somebody to tase you, were you at all told that you might be tased or warned that you might be tased?

A No, not at all.

Q What did it feel like to be tased?

A I don't know. It's extremely painful. I have had my fair share of injuries and been subject to different types of pains, but I could personally tell you that being shot with a taser gun is extremely painful. It's hard to explain. You can feel electricity come through your body and exit at the bottom of your feet. And it's such serious pain that, you know, I hope no one ever has to experience it because there's no—you'll never forget that type of pain ever.

Q Okay. During any of the time that you were in the receiving cell did you threaten any of the officers?

A No, I did not.

Q Did you resist their efforts to take off your handcuffs?

A No, I did not.

[2-A-54] Q Okay. You indicated at one point that you may have raised your head or raised up. Did you attempt at any time to do anything like bite any of the officers or anything like that?

A Absolutely not, no.

Q Now, did you read any reports of this incident later?

A Yes, I did.

Q And did you read anything about biting or anything like that?

A Yeah. I had read—

MR. JONES: Objection, Your Honor.

THE COURT: Sustained.

BY MR. PARDON:

Q All right. I will go on. Do you recall whether you were asked sometime afterwards if you wanted to see the nurse?

A Yeah. The nurse came to my cell and asked me some questions. I don't remember what she asked me, but I was pretty much—I was just irritated with everybody, what just happened to me, and I didn't want to talk to anybody.

Q Okay. What did your hands look like after they removed the handcuffs?

A I remember you could see, like, the indentations.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF JURY TRIAL HELD BEFORE THE HONORABLE JUDGE BARBARA B. CRABB

October 15, 2012
9:00 a.m.
Madison, Wisconsin

APPEARANCES:

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Merchant & Gould, P.C.
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JOEL GRAHAM
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Julie King, Paralegal

For the Defendants: Whyte Hirschboeck Dudek, S.C.
BY: ANDREW JONES
TIMOTHY POSNANSKI
555 East Wells, Ste. 1900
Milwaukee, Wisconsin 53202

* * *

[2-A-88] sure to speak right into the microphone.

ADVERSE EXAMINATION

BY MR. PARDON:

Q Good morning, Lieutenant Conroy.

A Good morning.

Q Obvious question, but could you state your name, please?

A Robert Conroy.

MR. PARDON: All right. I apologize, Your Honor. I request permission to proceed with an adverse examination.

THE COURT: Any objection?

MR. JONES: No, Your Honor.

THE COURT: You may proceed.

MR. PARDON: Thank you.

BY MR. PARDON:

Q Lieutenant Conroy, you're presently a patrol operations lieutenant for Monroe County; isn't that correct?

A Correct.

Q All right. And you've held that position since March of 2011, right?

A Right around there, yes, correct.

Q And prior to that time you were a jail administrator for Monroe County, right?

* * *

[2-A-97] complained about his foot hurting, right?

A Yes.

Q And so he was then carried into the hallway by Sergeant Hendrickson and Deputy Blanton, correct?

A Yes.

Q Carried or dragged, depending on what you hear, right?

A Carried.

Q All right. And after he was brought out into the hallway, you talked to him a little bit, didn't you?

A Correct.

Q All right. And during the time that you were talking to him, he didn't make any threats to you or to any of the other deputies, correct?

A No, he didn't.

Q And so a group of you then carried him down to the receiving cell, right?

A Correct.

Q All right. And I think it's your estimate that the distance he was carried from his cell down to the receiving cell was approximately a hundred feet?

A Yes. That was my estimate.

Q Okay. And during the time he was being carried, Mr. Kingsley did not make any threats to harm anyone; isn't that correct?

[2-A-98] A Correct.

Q And during the time he was carried, Mr. Kingsley did not exhibit any active resistance, as far as you know; isn't that correct?

A He showed resistance, but active, no.

Q Okay. And after Mr. Kingsley was carried to the receiving cell, he was placed facedown on the concrete bunk with his head away from the door, right?

A Correct.

Q All right. And just to be clear so the jury kind of has an idea, in the receiving cell there's the doorway, kind of the entryway, and then the concrete bunk is on the left as you walk into the cell, right?

A Correct.

Q Okay. And basically after you helped carry him in, you then sort of walked and stood outside the cell, right?

A Correct.

Q All right. And that left Sergeant Hendrickson and Deputy Degner still in the cell along with Sergeant Shisler and Deputy Blanton, right?

A Correct.

Q Okay. And in terms of where the deputies were, Deputy Blanton eventually sort of assumed the role of removing the cuffs. He was sort of in the middle of [2-A-99] Mr. Kingsley; isn't that right?

A Yes.

Q And Sergeant Shisler was sort of at Mr. Kingsley's legs, right?

A Yes.

Q And Sergeant Hendrickson was sort of at his torso and his head, right?

A Yes.

Q So they are all to the right of him, just to be clear, right?

A They were all on his right side, yes.

Q And Deputy Degner was sort of standing behind him for a while and at one point he moved to Mr. Kingsley's shoulder area between Dr. Blanton and Sergeant Hendrickson, right?

A Correct.

Q And you were outside, again, just to be clear?

A Just outside, yes.

Q And if you looked in, you could see some of what was going on in the receiving cell, but some of it was blocked by the deputies, right?

A Yes.

Q All right. And you don't recall, for example, whether you see—saw, like, Mr. Kingsley's feet moving around, right?

[2-A-100] A I don't recall his feet moving around, no.

Q And you believe you saw some movement of Mr. Kingsley. It was mostly he moved his upper body some of the time, right?

A Movements in his upper body, yes.

Q He wasn't moving his upper body the entire time, right?

A Not the entire time, no.

Q And you kind of heard some moaning and growing from Mr. Kingsley, right?

A Yes.

Q All right. And you heard him say, "Leave the handcuffs on and get the 'f' out," right?

A Yes.

Q All right. And you personally didn't see any resistive tension in Mr. Kingsley's arms, right?

A Inside the cell?

Q Inside the receiving cell, correct.

A Not while he was inside the cell no.

Q Okay. You didn't hear Mr. Kingsley make any physical threats to harm any of the deputies while he was inside the receiving cell, did you?

A I did not.

Q All right. You did not see Mr. Kingsley attempt to bite anyone, did you?

[2-A-101] A I did not.

Q You didn't hear anything from any of the deputies that suggested Mr. Kingsley was attempting to bite anyone, did you?

A While inside the receiving cell?

Q While inside the receiving cell.

A No, I did not.

Q Thank you. All right. And I would like to ask you about the use of the taser. You didn't hear anyone threaten to use the taser before it was used, did you?

A No.

Q Okay. And as far as you can remember, you didn't actually see Deputy Degner deploy the taser at the time it was deployed; isn't that correct?

A I saw him move in, but I couldn't see it deployed though.

Q You don't actually even remember hearing the taser being deployed, correct?

A Correct.

Q And in fact you didn't recognize that the taser had been applied until probably a few seconds after that; isn't that correct?

A Correct.

Q All right. And at the time the taser was used, you didn't know why they chose to use it; isn't that right?

[2-A-102] A Correct.

Q All right. In fact I think you said something about that when you wrote an incident report about it as well, didn't you?

A Yes.

Q Okay. And just to be clear, from your personal experience, if Deputy Degner had disagreed with an instruction from Sergeant Hendrickson to use the taser, it would have been his obligation not to use the taser; is that correct?

A Correct.

Q All right. And that's because if one officer tells another officer to use force, the person who is actually applying the force is still responsible for making their own decisions, aren't they?

A It's your obligation to not follow through with that or if you see somebody, yes, officer override, that's correct.

Q All right. At this time I would like to introduce Plaintiff's Exhibit 13, which is a collection of some videos. And it's my understanding, Your Honor, we have a stipulation that this can be admitted into evidence.

MR. JONES: That's correct. No objection.

THE COURT: All right.

MR. PARDON: Could you turn on the laptop here?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 11/05/12]

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF JURY TRIAL AFTERNOON SESSION HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury

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October 15, 2012
1:14 p.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould
BY: EDWARD PARDON
WENDY WARD
JOEL GRAHAM
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For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
TIMOTHY POSNANSKI
One East Main Street
Madison, Wisconsin 53703

* * *

[2-P-51] Q Was there any discipline to be imposed other than these lockdowns and the segregation in the receiving cell? Or was that it?

A No other discipline, just a lockdown.

MR. JONES: Thank you.

THE COURT: You may step down.

(Witness excused at 2:21 p.m.)

THE COURT: Mr. Pardon, you may call your next witness.

MR. PARDON: All right. Your Honor –

MR. JONES: I'm sorry, I didn't mean to interrupt, but this witness was under subpoena. Is he released from that subpoena?

MR. PARDON: Yes.

THE COURT: You're free to leave the building.

MR. PARDON: Your Honor, we call Mr. Brian Landers.

BRIAN LANDERS, PLAINTIFF'S WITNESS, SWORN,

DIRECT EXAMINATION

BY MR. PARDON:

Q Good afternoon.

A Good afternoon.

Q Could you state your name.

A Brian Landers.

Q Mr. Landers, what is your present employment [2-P-52] position?

A I am the criminal justice chair for Madison College.

Q And Madison College, just for the benefit of our jury, has that been referred to as any other names?

A Yes. Madison Area Technical College.

Q MATC?

A MATC, correct.

Q Do you have any other positions that you presently hold?

A I co-own a company called *BlueboardIT*, and I'm also an elected official. I'm the mayor of the City of Wisconsin Dells.

Q Could you briefly describe your educational background.

A I have a social degree studies from MATC. I also have a bachelor of science in criminal justice and prelaw from Mt. Senario College. And I also attended the 500—or the 400-hour at that time Basic Law Enforcement Recruit Academy at MATC.

Q All right. And do you have any direct experience in law enforcement?

A Yes. I served 18 years with the Wisconsin Dells Police Department.

Q And when was that?

[2-P-53] A From 1992 to the end of 2010.

Q Okay. And what in general were your duties as a police officer?

A General patrol duties. Investigative duties. As I advanced through the Department, I became a canine handler for about eight-and-a-half years. I was on the drug unit. I was assigned to the county drug units as well in Sauk and Columbia County. I was in charge of Department training.

I was promoted to Lieutenant in 2003 through 2008. In 2008 I was promoted to Lieutenant. Part of my duties as a sergeant were supervision of patrol staff, supervision of nonpatrol staff, as well our dispatch. Part of my duties as Lieutenant was to do policy guidance, assessment budgeting.

We also had a municipal lockup, so duties included administration of the municipal lockup as well.

Q Just to clarify I think you said you became a Lieutenant in 2003.

A I'm sorry. Sergeant. I was promoted to Sergeant from 2003 to 2005 or 2003 to 2008 and then 2008 I was promoted to Lieutenant.

Q Okay. And did part of your training as a police officer involve the appropriate use of force?

A Yes, it did.

[2-P-54] Q Did you ever have occasion to use force or consider the use of force while you were a police officer?

A Many times.

Q Did you ever have occasion to use a taser on anyone while you were a police officer?

A Yes, I did.

Q And have you ever yourself been tased?

A Yes, I have.

Q What does it feel like?

A It hurts.

Q And as part of your duties in the Wisconsin Dells Police Department, did you have occasion to have access to a jail?

A Yes. The City of Wisconsin Dells actually sits on four different counties: Sauk, Columbia, Juneau and Adams. So we had to be familiar with the jail procedures in all four of those jails. That included taking people to the jail; sometimes we'd have to pick them up to transport them to other places; sometimes we'd have to interview people at the jail. So we had to be familiar with those jails, as well as our municipal lockup as well.

Q Okay. Now, you mentioned that you're on the faculty of Madison College or MATC, formerly known as MATC. How long have you been on the faculty?

[2-P-55] A I was part-time since 2000 and then I was hired full time in December of—actually technically September of 2010.

Q Okay. And what are your present duties at Madison College?

A As criminal justice chair, the bulk of my duties include the administration of The Law Enforcement Academy, The Jail Academy and the specialized training. Specialized training is when a police officer gets done with their basic training, then they go through specialized training to keep up their certifications or to get an advance knowledge or training in a specific skill.

Part—I also teach within the Law Enforcement Academy, and part of my duties when initially hired and still carry with me today is I'm kind of the course coordinator and lead professor of a course called *Introductions to Corrections* which is a course that's trained in the associate degree portion of the Madison Area Technical College.

Q Have you ever heard of something called—that's colloquially called the *DAAT Manual*?

A Yes.

Q What does DAAT stand for?

A DAAT is an acronym. D-A-A-T. It stands for [2-P-56] *Defensive And Arrest Tactics*.

Q Do you do any instruction with respect to the DAAT Manual?

A Yes. I've been a DAAT instructor since 2000. I've been the lead instructor for MATC in their DAAT program since 2003, and was also appointed as a master instructor of defensive tactics.

Q Okay. Just to back up a bit, what professions are you preparing the students that you're teaching at Madison College?

A Wide variety. Our students go on to become police officers, sheriff's deputies, jailers, correctional employees at both the state and federal level, federal law enforcement, probation, courts, sometimes private security.

Q Okay. And how many officers have you personally trained?

A Well over a thousand.

Q Just to help us if there's any—to be clear, are there any differences between corrections officers, jailers, and police officers?

A Yeah. Police officers are officers that work on patrol. They work the street. Jailers are people that work through—usually through a county sheriff's Office that are assigned to work in a jail setting. [2-P-57] Correctional officers are—usually that term is referred to people that work in the profession of corrections at the state or federal level working in prisons.

Q All right. And would a police officer or a sheriff's deputy be qualified to work in a jail, in a county jail?

A They would be qualified. The qualifications are higher for law enforcement than they are for jailers per se; not to say the professionalism should not be equal, but they would be qualified. But if they were going to work as a jailer full time, then they would have to attend and complete the Jail Academy.

Q All right. You talked earlier about the Defensive And Arrest Tactics Manual. Could you describe a little bit more about what that is?

A The Defensive And Arrest Tactics Manual is kind of the guide or the Bible for use of force in Wisconsin. Every single police officer in the State of Wisconsin, when they go through the academy, has to be trained in defense and arrest tactics. The manual is just that. It's the training manual for every single law enforcement officer in Wisconsin.

Q All right. And have you personally played any role in developing the content of the DAAT Manual?

[2-P-58] A Yes, I have.

Q And how so?

A I've been appointed by the—I was a State of Wisconsin, Department of Justice, Division and Training in Standards as a member of the Tactical Advisory Committee. The Tactical Advisory Committee is the committee that shaped law enforcement training, including the authoring, distribution, and regulations of training anything related to defensive and arrest tactics as a statewide curriculum.

Q And as part of your role on the Wisconsin DOJ Tactical Advisory Committee, have you assisted in preparation of other manuals that are used?

A Yes. Under our guidance, not only is DAAT's curriculum part of our program, but the state firearms curriculum; the tactical response curriculum, which would be something like a active shooter or the school shooting; and also the electronic control device training and curriculum.

Q And electronic control device, does that include a TASER?

A Yeah. It's the state's name for a TASER.

Q Okay. Are there differences in the way that law enforcement officers or police officers are trained in use-of-force principles as opposed to the way jail [2-P-59] officers are trained?

A No. There's different topics: Defensive and arrest tactics is meant more for law enforcement training. Jailers have to go through what we call POSC, which is P-O-S-C. It's an acronym for Principles of Subject Control.

Out of the physical requirements, when somebody goes through an academy, they're required to have a physical testing, besides a written exam, but to make

sure that all the competencies, that they know have to do the different skills required. Out of the 50 requirements in POSC, and I believe there's 49 in DAATs, they're almost 99% identical. But the major difference between POSC in jail and DAAT in law enforcement is a lot of the—some of the tactics like group handcuffing or escorting a person from point A to point B. There's more emphasis on doing it as a team or as a group in a jail than there is in DAAT.

The theory is is that a lot of police officers, especially in Wisconsin, work in rural or isolated areas, so there's more of an emphasis on how to take care of yourself when you're on your own.

Q Okay. And you sort of said this, but what's the relationship between POSC and DAAT Manuals?

A The relationship is that there's a separate [2-P-60] committee, the POSC Committee that the state appoints. Back a couple years ago, I want to say somewhere around 2010, they decided to shape their manual in line with the DAAT Manual so that there's almost seamless training between the two.

Q Okay. I'm going to refer you to Plaintiff's Exhibit 1067, if you could find that in your binder, please. Sorry about the bulkiness.

A That's okay. I believe I have it.

Q Okay. Could you describe what Plaintiff's Exhibit 106 is.

A It would be my curriculum vitae or my resume.

Q And does this accurately reflect your employment and educational experience?

A Yes, it does.

MR. PARDON: Your Honor, I move to admit Plaintiff's Exhibit 106.

MR. JONES: No objection.

THE COURT: Received.

MR. PARDON: May I publish it then for the jury?

THE COURT: Any objection?

MR. JONES: No.

THE COURT: You may.

BY MR. PARDON:

[2-P-61] Q All right. I'm going to direct your attention to the second page of your resume. Now again, I have put yellow markings on the copy here that I'm showing the jury and you. I'd like to highlight a couple of things and I'm going to refer to the section on instructor certifications. Can you describe what are instructor certifications?

A These are specific certifications that are provided either through the State of Wisconsin Department of Justice; sometimes there are private entities that will also certify you in certain areas.

Q Okay. And I'd like to call your attention to the second highlighted portion I have there. What's a master instructor of defensive tactics?

A That is somebody that has to be appointed through a technical college or training academy. Actually they're referred to by a technical college or a training academy to the Department of Justice of somebody who has advanced knowledge or training in the use of defensive tactics and the training of defensive tactics to become a trainer.

The Department of Justice Training and Standards then reviews that and if they feel the person is qualified, they will appoint them as a master instructor.

[2-P-62] Q And you have that certification?

A Yes.

Q Okay. And the second highlighted thing I have a few lines down says *report writing instructor*. Do you see that?

A Yes, I do.

Q What certification is that? What's that about?

A That's another—you have to submit kind of an application resume to the Department of Justice, again outlining your training and experience and education, and the training and standards board meets and if they feel that you're qualified to teach this, then you are certified as a report writing instructor.

Q And I'm going to refer you to the final certification I have highlighted. Do you see the one that says *TASER instructor*?

A Yes.

Q And previously what's that?

A That would be a private vendor outside the State of Wisconsin, Taser International, that if you go through their training course, then you are certified as a TASER instructor if you go through the instructor level course.

Q You can set the resume aside here for now. Have you evaluated use-of-force issues before?

[2-P-63] A Yes, I have.

Q All right. Have you ever testified in a case like this before?

A No, I have not.

Q Okay. What were you asked to do in connection with this case, Mr. Landers?

A Give me one second.

Q Okay. I apologize.

A That's okay. Excuse me. I was asked to do—to review this incident and establish an opinion, and I've established an opinion based upon the three incidents. The first incident that I've established an opinion on was that the use of the taser was unreasonable.

The second—

MR. JONES: Objection, Your Honor.

THE COURT: I'm sorry. Did you object?

MR. JONES: I did object. May I approach?

THE COURT: You may.

(Discussion at side bar at 2:35 p.m.)

MR. JONES: This has been covered in part in the motions in limine, but I wanted to renew my objection to the witness testifying about what is reasonable and unreasonable.

THE COURT: What is—

MR. JONES: What is reasonable force or what is [2-P-64] unreasonable force. We think that's essentially a legal conclusion and that he should not be permitted to testify to it. I do have citations if that would assist the Court.

MR. PARDON: I think the answer to your motion in limine, to the motion in limine was an accurate

description of the law. I think he can testify. He's talking about what the standards are, how officers are expected to act, and he's going to testify whether that's reasonable.

THE COURT: Right. We'll stick with that, with the ruling. Okay.

(End of side bar discussion at 2:35 p.m.)

BY MR. PARDON:

Q Getting back to where we were, let me reask the question. What were you asked to do in connection with this case?

A I was asked to review the case and establish an opinion based upon my review, and my opinion was that—my first opinion was that the use of the taser was unreasonable.

My second opinion that I've established is that the handcuffing that was done on Mr. Kingsley was not done appropriately and could have led to the handcuffs not being applied appropriately to tension in the arms of [2-P-65] Mr. Kingsley.

The last opinion that I've established was that the control tactics done by Sergeant Hendrickson in the receiving cell of Mr. Kingsley were also unreasonable.

Q Okay. I'm going to ask you more detail about those opinions in a bit. But I would just like to back up a little bit and say what things did you do personally to come to those conclusions?

A I reviewed the incident reports that were supplied to me. I reviewed the videos that were supplied to me. I also reviewed the policies by Monroe County. I've reviewed the deposition of Mr. Kingsley. I've also used the—used the State training manuals

that were present at the time of the incident. And I used my own training and experience to establish my opinion.

Q Okay. Did you review the training records of the officers in this case as well?

A Yes, I did.

Q All right. All right. I'd like to turn now to your opinion on the use of the taser, and if you could summarize why do you believe that the use of the taser on Mr. Kingsley under this circumstance was unreasonable?

A The use of a taser is—a taser is a weapon. The use of a taser in our state and also throughout many

* * *

[2-P-79] A That's usually set there by the monitoring company in cooperation with the jail staff. Behind that is the toilet, so it gives the inmate some privacy when they're using the toilet.

Q Okay. I'm going to play this video for the jury to watch. It's going to take a couple of minutes, but I would like everyone to see it, as well as yourself.

(Video played 2:56-2:59 p.m.)

Q I'm going to stop it there. Just so we're clear, are you able to identify the point on the video when the taser began to be deployed?

A It appears to me that the taser was employed right around 6:46:46, I believe somewhere around that, 6:45, 6:46.

Q Okay. What I'll do is I'll play a short segment of it, and just so we're all clear, if you could point out where that begins if you're able to see it. Okay?

A Okay.

(Video played)

A Right about there.

Q So when you said *right about there*—

A 6:45:46.

Q Okay. Thank you. I'd like to discuss your professional observations of the video. What aspects of this video led you to the conclusion that Mr. Kingsley [2-P-80] was not exhibiting active resistance?

A I don't see a physical threat to the officers there. I see a man that is handcuffed behind his back laying face down in a bunk with weight or pressure from the officers, and there's no physical harm presented to the officers.

Q All right. I'm going to move to a segment of the film where I asked you about some movements that Mr. Kingsley made with his upper body. So if you would bear with me while I fuddle with the computer here and get to the point that I want to start, I appreciate that.

Okay. I'm going to begin it at 6:44:34 and I'm going to play it for a little bit. So beginning at 6:44:34.

(Video played)

All right. Now I've stopped the video at 6:44:52, and I'd like to ask you did you see Mr. Kingsley's head or upper body make any movements there?

A Yeah. Lifting off of the bunk.

Q Okay. And first of all, based on your reports or review of your reports from this case, do you know which person is at Mr. Kingsley's head?

A I believe that would be Sergeant Hendrickson.

Q Are you aware there was some mention in the [2-P-81] incident reports in this case about a concern that Mr. Kingsley might try to bite someone?

A Yes.

Q All right. Does it appear to you from your professional review of the video that the actions of Sergeant Hendrickson around the time that Mr. Kingsley was moving his head are consistent with someone who is concerned about being bitten?

A No.

MR. JONES: Objection. Competence. Foundation.

THE COURT: Overruled.

BY MR. PARDON?

Q Why?

A Anyone concerned about being bitten is going to pay attention to the person. You're not going to stand away from them. You're going to try to control their head. You're going to be directing your attention at them. There were several times just prior to that taser being used that Sergeant Hendrickson isn't doing any of those things. He's letting Mr. Kingsley move his head a little bit. He takes control of the head and he lets it go. He takes control and lets it go. If you're worried about being bitten, you don't do that.

Q Okay. Do you think that Mr. Kingsley, lifting his [2-P-82] head in these instances here, constitutes aggression or active resistance?

A No.

Q Why?

A There's no—again, there's no threat of intentional bodily harm from a person just lifting their head off a bunk.

Q All right. Let me ask you about some of the noise you heard on the video. Did you hear Mr. Kingsley grunting and groaning?

A Sure.

Q Did you hear him at one point swearing at the officers?

A Yes, I did.

Q All right. Does Mr. Kingsley's yelling or grunting or groaning or swearing constitute a threat that would make you say he's exhibiting active resistance that would justify the use of a taser?

A That in and of itself, no.

Q Why not?

A Well, because other parts of our manual are just applications of what you learn in your experience is that people are going to say things and people are going to express their frustrations in a different way doesn't necessarily mean that they're a live threat to my bodily [2-P-83] harm. The old adage sticks and stones may break my bones, but names don't hurt me. You've got to have thick skin as a police officer.

Q Are officers, in fact, taught appropriate verbal skills?

A Yes, they are.

Q In your opinion, were appropriate verbal skills used here?

A No.

Q And why is that?

A Well, when you're dealing with somebody who is agitated to this level and you have the ability to control them by outnumbering them in a semi-secure place of a county jail, talking to them and being more reasonable, when someone is shouting and another person is shouting, it just kind of escalates the tension in the environment.

I mean using a calmer approach—and that's why in our Disturbance Resolution Manual we talk about that and the verbalization manual, we talk about using lesser means of verbalizing to try to de-escalate or calm a person.

Q All right. Do you know what the deputies have said in their incident reports about the reason why the taser was applied?

[2-P-84] A I read the incident reports, yes.

Q Okay. And what is your understanding of the reasoning described in the incident reports?

A They described that there's resistance.

Q Okay. Did you understand as to whether they were attempting to remove the handcuffs?

A Yes.

Q Is it your understanding that they were attempting to overcome resistance so that the handcuffs could be removed?

A Yes.

Q All right. And in your view does that explanation comply with professional standards?

A No. If a person is actively resisting you and you feel this person is going to present bodily harm to you,

I know I would question them why are you taking the handcuffs off. So they can become more combative and have more fighting skill? It just does not make sense to me.

Q All right. Just assume for a second that Mr. Kingsley for some reason, he didn't want his handcuffs removed; he was, in fact, tensing them up and tried to prevent them from being removed. Are there other options that the deputies could have used in this situation instead of a taser?

[2-P-85] A Yes.

Q What?

A I guess the next option is just time. Cooler heads. Trying to resolve it a little bit more peacefully. Another option that was discussed was the use of a chair. I don't know what all Monroe County has available to them, but it's very clear to me that there was no active resistance. Using a little bit more time and diplomacy might have resolved this.

Q And again, just to be clear, is it preferable to leave somebody in handcuffs alone?

A No.

Q What would you do, in fact, if you were to back off a little bit? How would you handle that situation?

A Well, there's something that—and I believe that one of the—that Lieutenant Conroy touched on override. Override is when you see—and this is also trained in other areas of the academies—override is when you see that officers are getting frustrated. They're having problems dealing with somebody. So maybe somebody, kind of a new face, a new approach can step in there and try to take over. So there's an officer override factor that, you know,

maybe Lieutenant Conroy could have stepped in and said back out from here. And Mr. Kingsley, let's discuss this. Take a time out, if [2-P-86] you will. That's one area that you can use.

Another area is that you can maintain observation of him or maybe having somebody close by and just give him a little time right now. I just don't see that. You know, what is the urgency here.

Q Okay. I'd like to ask you about the incident reports that you said you reviewed. First of all, are you—are you familiar with procedures that officers use to write incident reports?

A Yes.

Q All right. And in general, how should an officer writing an incident report involving the use-of-force document that use?

A Well, they need to articulate their use of force. First thing they have to do is identify the actions factually as to why they had to use the force.

The next thing they do is they have to identify what tactics they used to respond to that level.

Last thing that they would do is to describe whether there was follow-through procedures, whether that's medical or just talking to the person, calming them down, whatever that they would use as well. All that has to be factual.

Q And in writing about an incident report, would you expect that an officer would sort of describe the worst

* * *

[2-P-97] the deputies complied with the Monroe County policy in this case?

A In particular attention is No. 4, "Intermediate weapon and the use of a stun device or an electronic security belt."

MR. JONES: I'm going to object to the testimony, Your Honor, as being irrelevant.

MR. PARDON: May I?

THE COURT: Mr. Pardon. Oh, I thought you wanted to be heard.

MR. PARDON: I do.

THE COURT: Okay. Go ahead.

MR. PARDON: I mean it's in his report and it's relevant to the expectations of how force was to be used.

THE COURT: I'll overrule the objection. I think this is appropriate testimony.

BY MR. PARDON:

Q Okay. You were referring to Sec. 4 I think of the report. How does that inform your opinions in this case?

A It informs my opinions that the expectation of performance by Monroe County employees was that the intermediate weapon, which would be in today's language—actually language at the time, but it was not [2-P-98] updated, would be protective alternative. So what they've essentially done is they said that where the state has said that you can use a taser or a stun device at a level of control alternatives which is—control alternatives would again be when you're facing active resistance or threat, they put it at one level even higher. Now—

THE COURT: I'm sorry, when you say *they*, who are you talking about?

THE WITNESS: Monroe County. I'm sorry, Ma'am. They put that at one level higher. So this is at a level that is in today's time, you would be faced with ongoing resistance or assaultive behavior in which you really have a definitive fear that you're going to be seriously hurt by this person.

So what Monroe County did is they told their deputies even though the state is saying this, you can use the taser at a lower level, we expect you to use it at an even higher level, which would be equal to use of a baton.

BY MR. PARDON:

Q All right. Set that aside then. Just briefly again then, could you, just to sum it up, summarize your opinion about why the use of the taser was not appropriate in this case?

[2-P-99] A There was no active resistance. There was no intentional threat of bodily harm against any of the deputies that were there.

Q All right. I'd like to ask you about a second opinion you expressed in this case. You testified earlier that the handcuffs were improperly applied. Do you recall that?

A Yes, I do.

Q All right. And that that, in fact, may have led to—it was possible that that led to tension and pain on the part of Mr. Kingsley. Do you recall that?

A Yes.

Q All right. And just to be clear, are you saying that there was resistive tension by Mr. Kingsley?

A I'm just saying that that was what was reported in the officers' reports.

Q Now you said that the handcuffs were put on improperly and I'm wondering if you could just describe and perhaps demonstrate to the jury a proper means of putting on a handcuff.

A Okay. Handcuffs are generally placed on a person in either a compliant or noncompliant fashion, whatever the subject is exhibiting at the time. In a compliant fashion, officers are trained how to verbalize with the person, how to stabilize a person, how they move in to

* * *

[LANDERS-CROSS-EXAMINATION]

[2-P-126] Q Let me ask it a different way because you can say that. When someone becomes trained in Wisconsin to be a jailer, so to work in a county jail—

A Yes.

Q —that training is through what people generally refer to as *jail school*; correct?

A Yes.

Q And that's a training program that lasts more than 100 hours; correct?

A I'd say there are 120 or 160 hours, depending upon the program.

Q It changes from time to time; correct?

A It doesn't change, it just depends on what technical college or what academy, how they facilitate the program.

Q You have never taught any courses as part of that formal jail school; correct?

A Correct.

Q We've talked about something called *POSC*, Principles of Subject Control; yes?

A Yes.

Q And that is a training guide that is used to train jailers, if I've got the phrase right, in Wisconsin; yes?

A Yes.

[2-P-127] Q You have never taught any courses about the POSC training guide; correct?

A Correct.

Q And there was—you were asked some questions about your role in developing the DAAT training guide; yes?

A Yes.

Q And your name is, in fact, in the DAAT training guide; correct?

A Correct.

Q Your name is not in the POSC training guide, is it?

A No, it's not.

Q You were not involved in writing or developing POSC, were you?

A No.

Q And jail school does not include training under the DAAT training guide, does it?

A Is it specific—are you saying is DAAT taught in the jail school?

Q Do they use DAAT, the training guide itself, in jail school?

A Well, the current POSC is based upon the DAAT training.

Q But they use POSC, it's not DAAT.

A Correct.

[2-P-128] Q Your highest level of education is a bachelor of science?

A Correct.

Q Have you ever published any professional articles or textbooks?

A No.

Q And you're serving as a paid expert in this instance; correct?

A Yes.

Q I'd like to ask you about some materials in POSC. If I could show you Exhibit 517. It will actually show up on—it should show up on your screen.

Do you recognize at least the first page of this exhibit?

A It's the POSC Manual from June 2009.

Q So was this the manual that was in place and being used at the time of the incident with Mr. Kingsley in May 2010?

A It should have been.

Q If I could refer you—

MR. JONES: Actually I would move the admission of 517, Your Honor.

MR. PARDON: No objection.

THE COURT: Received.

BY MR. JONES:

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF JURY TRIAL HELD BEFORE THE HONORABLE JUDGE BARBARA B. CRABB

October 16, 2012
11:00 a.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould, P.C.
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JOEL GRAHAM
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Julie King, Paralegal

For the Defendants: Whyte Hirschboeck Dudek, S.C.
BY: ANDREW JONES
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Milwaukee, Wisconsin 53202

* * *

[3-A-49] THE COURT: All right. And without giving up any rights, we'll go right into the defendants' case at this point, reserving any rights that you have.

MR. JONES: Can we approach briefly, Your Honor.

THE COURT: Sure.

(At side bar.)

MR. JONES: Only because I wanted to be actually clear that I understood what you were saying, we do have a motion. We would like to make a motion under Rule 50.

THE COURT: Right. I assumed that you would. And you are not losing any rights and not arguing it at this moment.

MR. JONES: Okay.

THE COURT: That's what I wanted to make clear to you. I guess I didn't do a very good job.

MR. JONES: Paranoia, Judge.

(End of side bar.)

THE COURT: Mr. Jones, you may call your first witness.

MR. JONES: Thank you, Judge. We would like to call Karl Blanton.

KARL BLANTON, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. POSNANSKI:

Q Good afternoon, Mr. Blanton. Could you please state [3-A-50] your name for the record?

A Karl Blanton.

THE COURT: Is that a K-A-R-L or C-A-R-L?

THE WITNESS: K.

THE COURT: Thank you.

BY MR. POSNANSKI:

Q Mr. Blanton, you were formerly employed by the Monroe County Sheriff's Department?

A Yes, that's correct.

Q How long did you work there?

A I believe it was for about four years.

Q Do you know approximately when you started?

A February of 2009.

Q And when did you leave your employment with the Monroe County Sheriff's Department?

A My last day was September 1st of this year.

Q And why did you leave?

A To go back to school and change careers.

Q Are you currently in school?

A Yes, I am.

Q Where?

MS. WARD: Objection. Relevance, Your Honor.

THE COURT: Sustained.

BY MR. POSNANSKI:

Q Are you currently employed?

* * *

[3-A-67] A No, he did not.

Q What happened after that?

A At that time, since we had more room, we went ahead and decided that a deputy grab each limb, would be once again Sergeant Hendrickson and I would have the upper torso. I believe I was on the left arm, Sergeant Hendrickson was on the right arm. And I believe two deputies were—had each leg. I'm not sure which deputies those were.

Q And where was Mr. Kingsley carried ultimately?

A Ultimately he was carried to one of our receiving cells in our receiving areA We have three of them.

Q And can you describe how he was carried in and placed in the cell?

A Yes. He was—once again I believe four deputies. I had the left upper torso under his left arm, Sergeant Hendrickson had up under his right arm, and two deputies had each of his legs. He would have been in the facedown position as we carried him. We carried him through one doorway, then the second doorway, then we laid him facedown on the concrete bedding that is in a receiving cell.

Q Once he was placed on the concrete bunk, what did you and the other officers do?

A At that time we were trying to get the handcuffs off [3-A-68] of Mr. Kingsley. Mr. Kingsley was not making it easy for us, struggling, trying to flex, making it more difficult to remove the handcuffs with his wrist, grunting, showing a lot of anger, and we were trying to get the handcuffs off at that time.

Q Why did you want to remove the handcuffs?

A You want to remove the handcuffs once you have somebody in a receiving cell because that would be a safe place for them. Leaving somebody in there that is under distress, their hands behind their back, can severely hurt themselves and others. So it's a good option to try to remove the handcuffs as soon as possible to make sure that they don't hurt themselves. There's not a lot you can do when you're in handcuffs behind your back when you could possibly hurt yourself.

Q Did you have any role with respect to removing the handcuffs?

A I'm sorry. Can you repeat that?

Q Did you have any role with respect to removing the handcuffs from Mr. Kingsley?

A I did. I had the handcuff key and I was the one trying to remove the handcuffs.

Q As you attempted to remove the handcuffs, what was Mr. Kingsley doing?

A Mr. Kingsley was kind of rolling, shifting, flexing; [3-A-69] trying to pull the handcuffs apart as I'm trying to take them off, which made it difficult; lifting his upper torso, grunting, moving his hands; definitely was not making it easy to where I can remove the handcuffs.

Q Is it fair to say that Mr. Kingsley did not cooperate with your efforts to remove his handcuffs?

A That is correct.

Q You described a number of things that he was doing as you attempted to remove the handcuffs. I want to make sure that I understand all of these things.

A Sure.

Q You indicated that he was pulling his arms apart?

A Yes.

Q Moving his hands?

A Yes.

Q Lifting his torso?

A Yes.

Q Tensing his arms?

A Yes.

Q Was there anything else?

A I would guess also just kind of rolling back and forth just trying to, you could say, make it difficult or resisting. He was asked multiple times, stop resisting, making it harder for us to try to get these off.

Q I don't want you to guess. Was he rolling? Was he [3-A-70] moving?

A He is—he would move just a little bit left to right. I wouldn't say rolling, but just kind of moving, swaying left to right.

Q Thank you. As you were attempting to get the handcuffs off of Mr. Kingsley, did he attempt to pull his hands or arms away from your grasp?

A He was moving them, so I don't know if he was pulling them away from my grasp, but moving them enough to where I wasn't able to get the key into the keyhole. I felt like there was a lot of tension on the cuffs and his arms.

Q You described that he was lifting his torso. Did he attempt to lift his body off of the bunk?

A I don't know if he was lifting his body, but his upper torso kind of came up off the bunk.

Q Did you and the other officers do or saying anything to counteract his resistance?

A Multiple times trying to explain to Mr. Kingsley, let's get these cuffs off, let's work out this issue, let's just deal with this in a safe way, stop resisting, stop fighting us, let's get these cuffs off.

Q What was his response?

A A lot of grunting and hollering, just grunting, anger, frustration, is what I got out of it.

[3-A-71] Q Did any of the officers' efforts to get him to stop resisting work?

A No, they did not.

Q Can you explain that?

A Multiple efforts of trying to talk him down, trying hold him down, would not succeed.

Q Did Mr. Kingsley's resistance create a risk to anyone in the cell?

MS. WARD: Objection. Leading.

THE COURT: Overruled.

A To himself and to other officers, yes.

Q Can you explain that?

A Just the lifting of the torso, other officers on top of him, the moving around, can fairly—there's multiples things that could happen for people's safety when trying to resist. I can't assume, but multiple things could happen.

Q When you said "for people's safety," by that, what do you mean?

A I mean the inmate and the officers, yes.

Q You indicated that Mr. Kingsley was making some sounds at this time?

A Yes.

Q Could you describe those?

A It sounded like grunting out of anger and [3-A-72] frustration, is the way that I took it.

Q Do you know whether he was grunting because he was in pain?

A No. I did not take any of that as being in pain. I have experienced people being in pain, you know, "Get these off. I'm in a lot of pain." None of that came out.

Q Based on your experience, what did you perceive the sounds that he was making to be?

A In my experience it's just aggression, anger and frustration.

Q What happened next?

A After that, still trying to get the handcuffs off, at some point in time I believe there was an order by Sergeant—there was an order by Sergeant

Hendrickson to drive stun or tase Mr. Kingsley and that was done by Deputy Degner. And then at that point in time we were still trying to get the cuffs off. That still didn't happen. And eventually, a few moments later, Lieutenant Conroy asked for all the inmates—or I'm sorry—all the officers to step out.

Q If Mr. Kingsley was resisting your efforts, why were you still trying to remove the handcuffs?

A I think it came down to safety for Mr. Kingsley was the most important part. Leaving somebody handcuffed [3-A-73] behind their back in a cell like that is very dangerous, so it's very important to try to get those handcuffs off so that person is not left in a place by themselves with their hands behind their back.

Q "Cell like that," what do you mean?

A It's a receiving cell. It's concrete all around. There's places they can stand up on a ledge and try to hurt themselves and things of that sort.

Q Once the taser was applied, did Mr. Kingsley stop resisting?

A During the tasing the body tensed up. And then shortly after I think he was more agitated and he was still resisting. I was not able to get the cuffs off. There was still some struggling with the hands, a lot of anger, and we were still not able to get the cuffs off.

Q What happened at that point?

A At that point we were not able to get the handcuffs off. Lieutenant Conroy I believe gave the order for all the deputies to step out.

Q Upon receiving that order from Lieutenant Conroy, what did you do?

A Once we're—then we all stepped out, not at the same time. I believe I was probably the second one out and I believe Degner or Sergeant Shisler was the last one out.

[3-A-74] Q At the time that Lieutenant Conroy gave the order for the officers to leave the cell, was there any force used on Mr. Kingsley by any of the officers from that point forward until you left the receiving cell?

A No, I don't believe so.

Q Did you have any further interactions with Mr. Kingsley in connection with this incident?

A Before this incident or—I'm sorry.

Q Let me rephrase that. After you had left the cell the other officers on May 21st, 2010, did you have any other further involvement with Mr. Kingsley that day?

A Yes, I did. A short time after we went back with I believe three other deputies and we were able to get the cuffs off of Mr. Kingsley at that time.

Q Do you know who, besides yourself, was involved in that?

A I believe it was Deputy Wildes, Deputy Bedenbaugh, myself and I believe there was one more. I'm not sure.

Q What was your role?

A At that time I was—I had the taser outside the cell.

Q Who was responsible for removing the handcuffs, if you remember?

A I do not remember.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF JURY TRIAL AFTERNOON SESSION HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury

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October 16, 2012
1:46 p.m.
Madison, Wisconsin

APPEARANCES:

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* * *

[3-P-14] STANLEY HENDRICKSON,
DEFENDANT, SWORN,

DIRECT EXAMINATION

BY MR. JONES:

Q Would you please state your full name for the record.

A Stanley Vernon Hendrickson, Junior.

Q And you're employed by Monroe County?

A That's correct.

Q By the Sheriff's Department?

A Correct.

Q What's your current rank?

A Lieutenant.

Q Do you mind if I call you Sergeant since that was your rank at the time of the incident?

A That's fine.

Q And how long have you worked for the Sheriff's Department?

A Since August of 2000.

Q And you said you were a Lieutenant. What's your current job?

A I am the Jail Administrator for the Monroe County Jail.

Q How long have you been the Administrator?

A Since June 30th of last year.

Q What does it mean to be the Jail Administrator?

* * *

[3-P-30] A It is a floor plan of the section of the jail.

Q And there are some red lines on the jail; yes?

A Yes, there are.

Q What do those lines depict?

A They indicate the direction from the fifth cell in south block down the hallway, out the hall into the foyer area of receiving, into the third receiving cell.

Q What do those lines coincide with as it relates to this case?

A The route that we took Mr. Kingsley.

MR. JONES: I'd like to move the admission of 510B, Judge.

MR. PARDON: No objection.

THE COURT: I have 10E [verbatim] is received.

MR. JONES: May we publish it to the jury, Judge?

MR. PARDON: Yeah.

THE COURT: Yes, you may.

MR. PARDON: Sorry.

BY MR. JONES:

Q And again, as we're looking at this, this simply relates the route that Mr. Kingsley was taken from his cell to the receiving cell; correct?

A Correct.

Q Am I correct that once Mr. Kingsley was in the [3-P-31] receiving cell and had been laid on the bunk, you and Officer Blanton were attempting to take the handcuffs off?

A Correct.

Q And we've heard testimony from Officer Blanton and Lieutenant Conroy on this subject, but I'd like in your own words for you to tell us why you were trying to take his handcuffs off.

A To take the handcuffs off?

Q Yes.

A We generally do not leave people unattended in a cell with handcuffs on due to the possibility of injuring themselves.

Q You said generally you don't do that?

A Well, we don't. Standard practice is we don't.

Q All right. Do you ever do that if you can avoid doing it?

A Absolutely. Absolutely avoid it, yes.

Q Just to be clear, you're saying you absolutely avoid leaving people in the cells with handcuffs on?

MR. PARDON: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: Yes.

MR. JONES: Thank you.

[3-P-32] BY MR. JONES:

Q Did you say anything to Mr. Kingsley as Officer Blanton was trying to take the handcuffs off?

A "Stop resisting. Relax. Stop resisting. Relax." Numerous times.

Q We heard on the audio from the recording that different tones of voice were used; correct?

A Correct.

Q Can you explain why you and the other officers used different tones of voice as you were speaking to Mr. Kingsley?

A To try to persuade him.

Q And what was the purpose of using more aggressive louder tones of voice?

A To deliver an ultimatum to get him, you know, to stop, relax right now so we can get these off.

Q And what did you personally observe Mr. Kingsley doing as you were trying to take the handcuffs off?

A He was flexing and tensing, moving his hands, shrugging back and forth, making it hard to remove the handcuffs.

Q And flexing and tensing, flexing and tensing what?

A His arms, his body, pulling his arms apart, tightening his muscles, making it difficult so we couldn't maneuver to get in to get the handcuffs off.

[3-P-33] Q When you said he was moving his hands, can you tell us how he was moving his hands?

A Back and forth, twisting them out, pulling them apart.

Q And you said he was shrugging. Can you tell us what you mean by that?

A The shoulders moving like this back and forth.

(Indicating)

Q Can you describe it for the record?

A Side to side I guess would be the best way to describe it.

Q In your own words, can you tell us why that made it difficult to take the handcuffs off?

A It's hard enough to take them off when you're being still. It's a small hole, a small key. When people are moving and the cuffs are being moved, they're being taunt, it's really difficult to try to get those off.

Q Was there any other movement that you observed in Mr. Kingsley's upper body beyond what you've already described for us?

A He raised his upper torso off the bunk.

Q What did you hear Mr. Kingsley say as this was going on?

A "Get the mother's off, get the motherf'ers off" at one point and "get the 'f' out at another point."

[3-P-34] Q At any point after you put—well, strike that. At any point in the receiving cell did Mr. Kingsley say to you or any of the other officers that he was in pain?

A No, he did not.

Q Did Mr. Kingsley at any point in the receiving cell say to you or the other officers that the handcuffs were too tight?

A No, he did not.

Q Did he say to you at any point after you put the handcuffs on that they were too tight?

A No.

Q Did he say to you at any point in the receiving cell that he couldn't do what you were asking him to do?

A No, he did not.

Q We've listened to the recording obviously and we've heard other sounds that Mr. Kingsley was making. Do you remember those sounds?

A Yes.

Q How did you perceive those sounds?

A As anger. Aggressive sounds.

Q And can you tell us why that was your reaction to those?

A The tone and the growl that was in the noise.

Q You told us that you had directed him to stop resisting and to relax; right?

[3-P-35] A Correct.

Q Did you do anything physically to respond to what you were seeing and hearing from him?

A At one point when he lifted his torso up, I tried to stabilize him by pushing down on his upper torso, and with my hand to his head, I had my hand—do you want me to demonstrate?

Q Sure.

A I had my hand on the side of his head holding him down so he was more stable so he couldn't move around. I did at one point place my thumb in a pressure point right below the ear.

Q And why did you react to him lifting his torso off the bunk with what you've just described for us?

A It was my feeling that was an aggressive move. I felt threatened by it, so I wanted to restabilize and put him back down so he was not able to move around.

Q And why did you put your hand on his head in the way you've described?

A Once I pushed down on him and had him down, his head—his mouth was open, his head went towards my lower shanks. I had my leg back up on the—across his shoulder area and his mouth was open and he came towards me I think at that point and that's when I placed my hand—I moved my hand up to his head right away.

[3-P-36] Q And the pressure point that you described, can you tell us a little bit more specifically what you were doing?

A I was taking the thumb, the pad of my thumb, and pushing in towards the other side. There's a cluster of nerves there. If you push on it, it causes a pain sensation and you try to gain compliance by using pressure points.

Q Is that something that you're trained to do as part of jail school?

A Yes.

Q You mentioned in one of your answers just now the placement of your leg on Mr. Kingsley.

A Yes.

Q Can you tell us again what you were doing in that respect?

A I was trying to maintain control of Mr. Kingsley by stabilizing with the leg and shin area of my right leg.

Q And where was the leg and shin area of your right leg? Where did you have that on him?

A Across the upper back, the shoulder area.

Q Did you—how much pressure did you have on your leg when you were doing that?

A I was applying just enough pressure to maintain control.

[3-P-37] Q Did you have the weight of your knee directly on Mr. Kingsley's spine?

A No, I did not.

Q Did you put the weight of your knee directly on his neck?

A No, I did not.

Q Did you put the weight of your knee or leg directly on his head?

A No, I did not.

Q The things that you've described that you did and said, to your observation did they have any effect on getting Mr. Kingsley to stop doing what he was doing?

A No, it did not.

Q So he continued with the behaviors that you've already described?

A That's correct.

Q Did you have any concerns about what was happening in the receiving cell?

A Yes, I did.

Q What were your concerns?

A Well, my concerns were for safety for not only the staff and other officers' safety, but for Mr. Kingsley as well.

Q What specifically were your concerns in terms of safety?

[3-P-38] A Injury. Mr. Kingsley could bump his head, roll off the bed with the cuffs left on. He could slap his head into the wall if he kept thrashing around, enough to where he got over there. Officers' safety. Kicking. Biting. There's a metal lip on the edge of the bed. Somebody could have slipped and was injured that way.

Q You mentioned that, to go back a little bit in your testimony, you mentioned at one point in connection with when you had your hand on Mr. Kingsley's head that he had his mouth open and in your direction; correct?

A Correct.

Q Did that raise any concerns for you?

A Yes, it did.

Q What was the concern?

A The concern of biting.

Q Mr. Conroy, Lieutenant Conroy in his testimony, there were some questions and he gave

some testimony about conversation you and he had after these events—

A Correct.

Q —correct? Can you relate to us in your own words what happened or what that conversation was about?

A We spoke about the reason for the tase, why we used the taser. We discussed the plan forward from that point too.

Q And what was the discussion about in terms of the

* * *

[3-P-40] Conroy on that occasion?

A I had seen Mr.—Lieutenant Conroy's report and it said I told him that Mr. Kingsley tried to bite me and I told him that that was not factual.

Q Is it fair to say that you—well, from your perception, is it fair to say that you and Lieutenant Conroy had miscommunicated about that issue?

A Yes.

MR. PARDON: Objection.

Q I want to go back to May 21st. We had talked about your efforts physically and verbally to respond to what Mr. Kingsley was doing; correct?

A Correct.

Q And at some point you directed Deputy Degner to use the taser; correct?

A Correct.

Q And are you yourself trained to use a taser?

A Yes, I am.

Q And what was the course of training that you undertook to learn that? Sorry, I'll ask a better question.

A Okay.

Q When were you trained to use the taser?

A We get training every—I believe it's every other year on the taser.

[3-P-41] Q Okay. And can you tell us in your own words why you told Deputy Degner to tase Mr. Kingsley?

A Due to the concerns I had for injury to Mr. Kingsley and the staff and the noncompliance up to that point of Mr. Kingsley's resistance.

Q What did you hope to accomplish by using the taser?

A His compliance. His stopping of the resistance. We could remove the cuffs and exit safely.

Q Mr. Kingsley testified that you said loud enough for him to hear "tase his ass."

A I did not.

Q Did you say that?

A No, I did not.

Q At the point in time when you told Deputy Degner to tase him, did you feel there were other suitable or reasonable alternatives to using a taser?

A Not at the time, no.

Q Can you explain why that was your reasoning?

A The only other option would be going to the next level actually, using four strikes, and I didn't see it necessary to do that.

Q And you had used presence, that is the physical presence of officers; correct?

A Correct.

Q And you had used dialogue; correct?

[3-P-42] A Correct.

Q That is you had tried to verbally communicate with him.

A Correct.

Q You had used physical efforts on your part—

MR. PARDON: I'm going to object to this line of questioning as leading.

THE COURT: Sustained.

BY MR. JONES:

Q If Mr. Kingsley was resisting, why in your mind was it still a good idea to take the handcuffs off?

A Going back again to the possibility of injury to Mr. Kingsley if you left him alone with handcuffs on and the possibility of doing a re-injury and having more risk to staff at the time.

Q Once the taser was used, did Mr. Kingsley stop doing what he was doing?

A No, he did not.

Q Can you describe what was occurring after the taser was used?

A He was still resistive.

Q Was it the same behaviors or was it different behaviors from that point?

A He was still moving his hands, pulling his hands apart slightly.

[3-P-43] Q In that respect was the taser used a success?

A No.

Q At that point, Lieutenant Conroy directed everyone to exit the cell; am I right?

A Correct.

Q And did you use any force on Mr. Kingsley from that point forward?

A No.

Q Did you have any further interactions with Mr. Kingsley as it relates to this incident from that point for?

A No.

Q Before we finish, I'd just like to go back briefly to the use of the taser. Did you direct that Deputy Degner use the taser against Mr. Kingsley because he wouldn't take the paper off the light in his cell?

A No.

Q Did that have anything to do with why you decided it was necessary to use the taser?

A No.

Q Did you direct that Deputy Degner use the taser against Mr. Kingsley out of anger?

A No.

Q Were you angry at him?

A No.

[3-P-44] Q And did you direct that Deputy Degner use the taser in some way to show who was boss?

A No.

Q Is that anything that you do as an officer?

A No, it is not.

Q Did you direct that the taser be used as punishment for Mr. Kingsley?

A No.

Q And did you direct that the taser be used in some way to harm Mr. Kingsley?

A No.

MR. JONES: Thank you. (2:36 p.m.)

THE COURT: Mr. Pardon.

MR. PARDON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. PARDON:

Q Again, I apologize for calling you Sergeant Hendrickson. Since everybody has, I'm going to address you as Sergeant Hendrickson. Okay?

A That's fine.

Q Turning your attention to the evening before this incident, just want to be clear, you personally did not have any contact with Mr. Kingsley on the night of May 20th; correct?

A Correct.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF JURY TRIAL AFTERNOON SESSION HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury

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October 16, 2012
1:46 p.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould
BY: EDWARD PARDON
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For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
TIMOTHY POSNANSKI
One East Main Street
Madison, Wisconsin 53703

* * *

[3-P-62] MR. JONES: Call Deputy Degner.

FRITZ DEGNER, DEFENDANT, SWORN,

DIRECT EXAMINATION

BY MR. JONES:

Q Deputy, could you state your full name for the record.

A Fritz Alfred Degner.

Q And you're employed by the Sheriff's Department?

A Yes, I am.

Q Monroe County Sheriff's Department?

A Yes, I am.

Q How long have you worked at the Sheriff's Department?

A Since July of 1992.

Q And do you have any other law enforcement experience?

A Yes, I do. I was previously employed by the Sparta Police Department.

Q For how long?

A Eleven years.

Q And you're a deputy sheriff; correct?

A That is correct.

Q And you've been a deputy the entire time you've worked for the Sheriff's Department?

A Yes, I have.

* * *

[3-P-71] repeatedly what was wrong with his feet. What hurt. Which foot. With no response out of him.

Q And at some point he was then carried into the receiving cell?

A That is correct.

Q And we've seen on the video where you positioned yourself in the cell, the receiving cell itself?

A Yes.

Q Can you describe in words where that was?

A In the receiving cell—when you came into the receiving cell, again, as it was described before, the bunk is immediately to the left of the door. Mr. Kingsley was laying face down on that. Sergeant Shisler was at his feet. When I had entered in, Deputy Blanton was in the middle section where the handcuffs and his hands would be and Sergeant Hendrickson was at his head. I stood behind Sergeant Hendrickson and Deputy Blanton, basically up against the wall.

Q Why did you position yourself there?

A In case I needed—you know, they needed assistance from me.

Q And did you observe what was going on as the officers tried to take the handcuffs off?

A For as much as I could see past them.

Q And what, if anything, did you see as that was [3-P-72] occurring, given your vantage point of course?

A I could see movement out of Mr. Kingsley. I could see the officers moving. The more of what I was aware of was the verbalization where they were telling him to relax so they could take the handcuffs off and to quit resisting.

Q Did you observe anything in terms of his upper body or shoulders in terms of movement?

A When I—specifically when I put the taser on him where I had placed it on his shoulder is when I could see that he was shrugging and moving around. I could see that his arms were not—weren't—he wasn't keeping them still. He had a lot of tension and his muscles were tight.

Q Could you see anything in terms of what Mr. Kingsley was doing with his hands—with his arms down where the handcuffs were?

A Yes. Yesterday when Mr. Landers demonstrated the handcuffs, he had demonstrated them being in front. When we move people or when we transport people, normally the handcuffs are put in the back. It's more of a safety issue than anything else because it's for our safety. When someone is handcuffed in the front, it gives them leverage to come behind us or assault one of us. So his hands were behind his back. And what he [3-P-73] had, his fists were clenched. Imagine my hands are behind my back. He was pulling against them like this and growling.

Q Tell us more what you—strike that. What specifically did you hear Mr. Kingsley—what sounds did you hear from him?

A There was grunting. Again, to me it sounded like a growling like a bear. He wasn't verbalizing, other than what he initially verbalized at the beginning when he was first brought in and told to relax about taking the handcuffs off.

Q And how did you perceive the sounds he was making?

A I perceived them as threatening.

Q Did Mr. Kingsley say he was in pain at any point?

A No, he did not.

Q Did he say the handcuffs were too tight at any point from when they were put on until when he left the receiving cell?

A Not once.

Q Did Mr. Kingsley say in the receiving cell that he couldn't do what the officers were asking him to do?

A No, he didn't.

Q Did you—we've heard from Officer Blanton and Sergeant Hendrickson what they were doing in terms of trying to get the handcuffs off or to stop Mr. Kingsley [3-P-74] from doing what he was doing.

A Yes.

Q From your observation, did what they were saying or doing, did that have any effect on what Mr. Kingsley was doing?

A No, it did not.

Q Did it get him to stop?

A No.

Q Did you have any concerns about what was happening?

A Yes, I did.

Q Can you tell us what those concerns were?

A There were a number of concerns obviously as has been stated multiple times: The safety issue as far as with Mr. Kingsley fighting against us; the potential for him getting hurt; us getting hurt should he decide to escalate it. We're taught when dealing with people, as Mr. Landers explained, to look at everything that's going on with this. In 20 years, I've never had anybody fight us on taking handcuffs off. Everybody wants them off and they want them off as fast as they can because they're uncomfortable to have on. That wasn't the situation.

So when we're trying to take the handcuffs off and he's pulling on the handcuffs where the handcuff chain is so tight that you couldn't hardly manipulate the [3-P-75] handcuff from what it appeared to me, that's one of the things, you know, that I didn't know if he was trying to break the handcuff, which could then lead to a sudden assault by him. I couldn't see what was going on with his head because of where Sergeant Hendrickson was placed. So the discussion that was brought up as far as any actions by him I couldn't tell you.

But again, we're in the concrete cell where the edge of the cell shows where the black spot is, where the toilet is. That actually has a sharp—I would say a fairly sharp corner on it.

We talk about not leaving people handcuffed. One thing, as far as the law enforcement, we're taught not to let somebody walk or move unescorted with their

handcuffs behind their back because of the fact they can't catch themselves and I've experienced it where I've been escorting people who've pulled away from me and have fallen because of that.

Q You mentioned early on in your answer something about escalation.

A Yes.

Q Can you explain what you meant?

A Any situation can escalate rapidly. I don't know what his intent is. All I know is he's not complying with what he's told to do. I don't know if he's trying [3-P-76] to break the handcuffs. Somebody with broken handcuffs has two weapons on their wrists.

We recently had an officer assaulted by somebody with handcuffs that were—

MS. WARD: Objection, Your Honor. I'm going to move to strike that last part.

THE COURT: Sustained. The jury will disregard it.

THE WITNESS: Could you reask the question, please?

MR. JONES: Sure.

BY MR. JONES:

Q What was your concern about escalation?

A This was a volatile situation. Anything could have happened rapidly within it, whether he started to kick, again, the handcuffs, whether he tried to bite. I don't know. Any one of those could have gone on.

Q What about what had happened gave you a concern that the situation might escalate?

A Normally, like I said, anybody who is in handcuffs wants them off and they don't fight us to get them off. So by the fact that this whole situation, we were present. We've talked to him. We've tried to get him to comply with what we were trying to do. We used as many methods as we could up to that point and none of [3-P-77] them were being effective, and so they could have become—things could have changed very rapidly.

Q So at some point Sergeant Hendrickson told you to tase Mr. Kingsley; correct?

A That is correct.

Q Did he tell you to "tase his ass"?

A No.

Q Did you disagree with Sergeant Hendrickson's order to you?

A No, I didn't.

Q What would you have done had you disagreed with this order from your superior officer?

A I would have figured out some way to explain to him that I didn't feel it was justified at that moment to do things like that.

Q So what did you do once the Sergeant gave you the order?

A From when he told me to tase him, there was maybe a few second lapse in there before I actually pulled the trigger on the taser.

Q But you did?

A Yes, I did.

Q And that was on the back of his right shoulder?

A Yes, it was.

Q And are you trained in the use of a taser?

[3-P-78] A Yes, I am.

Q And how did you obtain that training?

A Interdepartmental training. We have two taser instructors on our staff.

Q And you use a contact stun; correct?

A Yes, I did.

Q How long was the taser applied in this instance?

A For one cycle of five seconds.

Q And how many times did you tase him?

A Just one time.

Q After you tased Mr. Kingsley, did he stop doing what he was doing?

A No, he didn't.

Q And at some point Lieutenant Conroy directed everyone to leave the cell; correct?

A That is correct.

Q Did you agree or disagree with that order?

A I agreed.

Q And what did you do?

A Well, first—I told Sergeant Hendrickson to go first because it was easy for him to come out and go past, and I remained there with the taser on Mr. Kingsley's back until Deputy Blanton left, and then Sergeant Shisler left. Because keeping control of the legs is the most important thing at that time as [3-P-79] everybody was disengaging. Once everybody

was out of the cell, I disengaged from Mr. Kingsley and removed the taser from his back and went out of the cell.

Q Do you use the taser against Mr. Kingsley because of whatever—because of whatever he had done to require that he be moved to the receiving cell?

A No, I did not.

Q Did you use the taser to punish Mr. Kingsley?

A No.

Q Did you use the taser because you were somehow angry at him?

MS. WARD: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: No.

BY MR. JONES:

Q Did you use the taser to somehow show him who was boss in this situation?

MS. WARD: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: No, I did not.

BY MR. JONES:

Q Did you use the taser in any way, shape or form for the purpose of causing harm to him?

A No, I did not.

MR. JONES: Thank you, Deputy.

[3-P-80] THE COURT: Ms. Ward.

MS. WARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. WARD:

Q When you got to the jail on the morning of May 21, 2010, you, Sergeant Hendrickson, Deputy Blanton, Sergeant Shisler and Lieutenant Conroy had a discussion about what each one of you would—what role you would take in addressing Mr. Kingsley; is that correct?

A That's correct.

Q And in that discussion, it was decided that you were going to cover with the taser in case he became violent; correct?

A If need be.

Q Is the answer yes?

A Yes.

Q And your recollection is that when the officers approached Mr. Kingsley in his cell, he was argumentative; right?

A Yes.

Q But you don't recall Mr. Kingsley making any threats to use physical violence against any of the officers; correct?

A No, I did not.

Q In fact, Mr. Kingsley told the officers at the time

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 11/05/12]

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF FOURTH
DAY OF JURY TRIAL
HELD BEFORE DISTRICT JUDGE
BARBARA B. CRABB, and a jury

October 17, 2012
9:00 a.m.
Madison, Wisconsin

APPEARANCES:

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For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
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One East Main Street
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* * *

[4] and Fritz Degner.

THE COURT: Thank you. And Mr. Jones, you may call your witness.

MR. JONES: We'd like to call John Peters.

THE COURT: He's here?

MR. JONES: He is here.

JOHN PETERS, DEFENDANTS' WITNESS, SWORN,

DIRECT EXAMINATION

BY MR. POSNANSKI:

Q Good morning.

A Good morning.

Q Can you please state your full name for the record, please.

A John G. Peters, Junior. P-e-t-e-r-s.

Q Where do you live?

A I actually live in Las Vegas, Nevada.

Q Where are you from originally?

A Lancaster County, Pennsylvania.

Q I'm going to show you what has been marked as Exhibit 519.

MR. POSNANSKI: Erica, can we get—

THE CLERK: I'm sorry.

Q Can you tell me what this is?

A It looks like a copy of my resume.

Q The full copy of your resume is in the binders [5] behind you if you need to see it. I can page through this if you need to.

My question is does this completely and accurately reflect your professional education and experience?

A I see this is dated December of 2011. There's been a couple updates since then, but most of it has stayed the same.

Q Can you describe your educational background?

A After high school I went to the Northern Virginia Community College in Andover, Virginia and obtained an associate applied science degree in police science. I also obtained a certificate in corrections from that same institution.

From there I took a year off. I went back to work or went back to school, I was working as a police officer, and I obtained a bachelor of science degree in criminal justice at the University of Baltimore in Baltimore, Maryland.

From there I took an academic leave of absence from the Sheriff's Department and went to Boston University and obtained a master's degree in public relations, and then went on to Babson College in Wellesley, Massachusetts and picked up a master's degree in business administration.

About 20 or so years later, I went back to school [6] and got my Ph.D. in applied management and decision sciences. And in June of this year, I completed my

academic requirements for the California teaching credential for the state of California.

Q What do you do for a living?

A My primary work is I run the Institute for the Prevention of In-Custody Deaths, which is a law enforcement training firm. It's in Henderson, Nevada, which is the next town over from Las Vegas. And we primarily train instructors; in other words, it would be called *train the trainers* where we go out and conduct training, primarily in the area of excited delirium or arrest-related deaths, and also forensics where you have an associated death, let's say from restraint or from tasers or pepper spray. Whatever the claim is, we teach basically how to forensically process that at the scene, what to collect, how to collect it, how to preserve the evidence.

I also have another training firm called the *Defensive Tactics Institute*, and in that training firm, which is primarily hands-on, we teach not only the weaponry which would be handcuffs, batons, flashlights, unarmed self-defense. But no handguns. We don't do any type of firearms training.

Q What's your position with the Institute for [7] Prevention of In-Custody Deaths?

A I was the founder, President, and also hold the title of Chief Learning Officer.

Q As Chief Learning Officer, I presume that means you teach?

A I do teach. I'm one of the instructional designers for programs, but Chief Learning Officer primarily focuses on identifying the appropriate scientific literature that's out there relative to what causes death, the science behind arrest-related deaths, that

type of thing. So my job basically is, in addition to the management side, is also looking at what's the current literature, what's the current science, then incorporating that into our training programs.

Q In your previous answer you talked about the fact that you train the trainer. To whom do you teach?

A We go all over North America to train. I won't go into a lot of detail, but some of the agencies that we've conducted training for, it's been the Los Angeles Police Department; Los Angeles County Sheriff's Department; United States Department of State; I've been here in Wisconsin at the Fox Valley—I believe it's called Technical College; other colleges here.

Most recently, two weeks ago I just got back from Toronto, Canada. We were up there in Ontario Province [8] with the Peel Regional Police. And I've also conducted training in the United Kingdom with the Royal Army Physical Training Corps, as well as the London Metropolitan Police and the Kent Constabulary in southern England in the Dover area.

Q How many years have you taught courses affiliated with this institute?

A With the Institute for the Prevention of In-Custody Deaths, it would be since 2005, which would be—it was seven years in March of this year; with Defensive Tactics Institute it's been since 1979.

Q In your role with the Institute for Prevention of In-Custody Deaths, you design curricula or taught courses regarding use of electronic control devices?

A Yes.

Q Do electronic control devices have another name?

A Yes. The most popular name for electronic control device is a *Taser*, t-a-s-e-r. There's another brand on the market called *CarbonArms*, and then we have, in addition to that, what's called *Nova* stun guns. *Ultron* stun guns. But all of those fit under the umbrella of electronic control devices.

Q Have you taught those courses to law enforcement officers?

A Both, including military as well.

[9] Q Could you explain briefly what the Defensive Tactics Institute is.

A The Defensive Tactics Institute again is a train the trainer type of firm where we train instructors. Our goal is to train instructors who then can go back to their respective law enforcement agencies and conduct in-house training or what we call in-service training. Some of the people we get—quite often we get police academy instructors who come through. We're very specialized.

For example, the Defensive Tactic Institute was the first training firm in the United States to develop a defensive flashlight course for law enforcement officers on the heavy duty flashlight such as the Maglite or the Kel-lite, those type of devices.

We also designed the first instructor program for handcuffing around the United States, which we called *Tactical Handcuffing*. We've done pepper spray, unarmed self-defense, a number of those things. So our goal is to provide instructor training so people can go back and then teach in their respective agencies, which is a lot more cost-effective for the agency.

Q What is your position with the Defensive Tactic Institute?

A President.

[10] Q As President, what is your role and responsibility?

A Very similar to the other institute; identifying some science relative to handcuffing or to impact tools or testing of batons, that type of thing. But then I also have written over 30 video scripts and helped produce 30 video information manuals, as we call them, on things such as the ASP baton that's made here in Appleton, Wisconsin. It's Armament Systems & Procedures, Maglites, handcuffing, handgun retention, handgun disarming, those types of things.

In addition to that, because we always include information on current legal cases, we also conduct limited legal research on that and acquire that information and share it with folks.

In addition to that, we also teach them how to train people and also evaluate them in the classroom and on the mat.

Q In your role with the Defensive Tactics Institute, have you designed any lesson plans or taught any courses dealing with the use of electronic control devices?

A Yes.

Q And can you describe that for me?

A Every manufacturer, each manufacturer has its own training program. Taser International has its own training program. CarbonArms has its own training [11] program. Nova Technologies has its own training program. What we do in the institute is we will take those various programs and try to synthesize the most important things from those into whatever we're going to be teaching.

In the case of Nova Technologies, with all its electronic restraint devices, whether it was a capture shield, which is a—looks like a riot shield with foil on the front that's electrified with batteries. We redesign the entire training program, wrote the entire new lesson plan, along with performance measures to quantitatively evaluate people.

With the taser material, some of the taser material that's currently out there regarding the collection and storage of cartridges and probes and those types of things, we found that if you follow the manufacturer's directive, that you were actually destroying evidence. So we altered that to bring it into more current times where that shouldn't happen. So that's basically what it is.

Q Have you taught courses regarding the actual use of the taser as well?

A Yes.

Q And to whom have you taught those courses?

A It varies. In June, we were with Wyoming Attorney [12] General's Office. We trained all their agents throughout the state of Wyoming. And part of that training involved showing the taser, demonstrating the taser, showing them how it worked, showing them how it fired, then showed them all the different parts of it. In other words, when a taser is discharged, inside the cartridge there's little, almost looks like confetti. They're called AFID, anti-felon identification circles, if you will, and they have the serial number of the cartridge embedded on them. So we showed them all that because they had no working knowledge at all of how tasers worked or anything else. So we took them through that whole training program.

Q Does that training program also include any discussion of when it's appropriate to use a taser?

A Always.

Q And does that training include training to—I think you touched on it, but if you can elaborate—law enforcement agencies?

A Yes.

Q Corrections agencies?

A Corrections. Military.

Q When was the last time you gave a presentation on the use of a taser to a law enforcement or corrections agency?

[13] A Two weeks ago in Peel Regional Police in Ontario, Canada.

Q You've touched on a number of different agencies in your answers to my questions. Can you just give us a sampling of the different law enforcement agencies you've taught courses to during your career?

A There's a bunch of them. Smith & Wesson Academy in Springfield, Massachusetts, which is mostly a handgun training firm. But we also did a lot of different courses up at Smith & Wesson; the Los Angeles Police Department; the California Highway Patrol; Seattle Police Department; Albuquerque Police Department; and Nevada POST, which was Peace Officers' Standards and Training. Many times we've gone to Carson City, long before I moved to Las Vegas, and did training there; state of New Mexico.

I've done training in every state in the United States but North Dakota. We've trained officers in North Dakota, but I personally have never set foot in North

Dakota. In Canada, we've been at the Laval Federal Correctional Institute outside of Montreal. I've taught in Quebec. I've taught Peel Regional Police. I've taught at the Vancouver British Columbia Police College. So we've been throughout Canada quite often, and as I explained, over in the United Kingdom.

* * *

[16] Q Have you ever been employed as a law enforcement officer?

A Yes.

Q And when and where?

A I was with the Northern York County Regional Police Department, which is the county next to Lancaster County, Pennsylvania. It's about 60 miles north of Baltimore, 30 miles south of Harrisburg, about 90 miles west of Philadelphia; gives you sort of a geographical area. I was a patrol officer there. I did routine patrol. We were a generalist in the sense that we could start a criminal investigation, but then it was turned over to the criminal investigator.

While there, I also held the title of self-defense specialist and conducted in-house training for the officers. From there, I went to the York County Sheriff's Department as a sworn deputy sheriff, and in that position, did prisoner transports, courtroom security, and worked through the Clerk of Court's office serving warrants, outstanding bench warrants, and any other warrant that would come into the county where we were looking for fugitives or whatever the case may be.

From there I went to the Braintree, Massachusetts Police Department in Braintree, Massachusetts, which is really the first big town on the south shore

going [17] toward the cape. It's where Routes 3 and 128 intersect. And there I held the position of staff executive, which was a civilian position. Its equivalent rank was that of deputy chief. But I also held a special, what's called a *special commission* in Massachusetts which was a sworn commission where I could make arrests, carry a handgun. I had the same powers as a Massachusetts state trooper. And in that position, I ran the Administrative Bureau, Director of Planning and Research in charge of the budget. All administrative things that the chief didn't want to do pretty much got handed to me. So I was in that position. So that was really the last law enforcement sworn position/civilian position that I had.

Q Thank you. You testified that you've taught courses regarding the use of the taser. Are you a certified taser instructor?

A Yes.

Q Have you published in the law enforcement corrections field?

A Yes.

Q Can you describe the general subjects of your published materials? I mean general.

A Probably the best way to describe it, I have about 196 publications as of last week. Some are in the area of use of force; some are in the area of policies and [18] procedures; some are in the area of self-defense type issues; some are in the area of recognizing behavioral signs for various medical emergencies; some deal with specific weaponry. For example, I've written several articles about taser devices and electronic control devices. So that's sort of a large grouping.

Q I want to focus now on your work in this case. When were you first asked to do work in this case?

A I believe it was some time in 2011.

Q And what were you asked to do?

A As I recall, I got a telephone call from your office asking me if I would be willing to review some documents in this case, which is my normal practice. Your office sent me some documents, I reviewed them, recontacted your office, and said I thought I could assist in the case.

I believe it was in December of that year I issued my first report in this case and then subsequently to that issued a supplemental report.

Q And you touched on it, but did you review any materials and develop any expert opinions you might have?

A Yes.

Q What materials did you review?

A For my initial report there were 17 various [19] documents, including four video disks, which included the complaint in this matter; various documents from the Monroe County Jail; the incident reports by Deputy Degner, Sergeant Hendrickson, Deputy Blanton, Deputy Manka and Lieutenant Conroy; shift logs; incident narrative report by Sergeant Hendrickson; Monroe County Supervisory Taser International Use Report; Monroe County Jail Inmate Major Violation Report on Michael Kingsley; deposition transcripts.

And then in addition to that when I wrote the report, I cited the various documents that are out there, including the Wisconsin Department of Justice

Advisory Committee recommendations for training on the electronic control devices, the Wisconsin DAAT Manual, various documents from Taser International.

Q And as a result of your review of these materials, have you formed any opinions about what happened in this case as an expert in the law enforcement corrections field?

A Yes.

Q Do you hold these opinions to a reasonable degree of professional certainty?

A Yes.

Q You mentioned the DAAT Manual as one of the materials you reviewed; is that right?

[20] A Yes.

Q Okay. Are you aware of what training manuals are used to train law enforcement and corrections officers in Wisconsin?

A Well, there are several. When it comes to the area of self-defense, handcuffing, those types of areas, the DAAT Manual is one of the primary devices known for correctional—or correctional officers have what is called the POSC, P-O-S-C Manual, which basically deals with prisoner and subject restraint which is a little more narrow and focused. Those would be the two that deal primarily with what we would call *defensive tactics*-type instruction.

Now in addition to that, throughout the academies of course you have the criminal code, motor vehicle code, officer safety things, but those would be the primary two for officer safety regarding handcuffing arrests, that type of thing.

Q And again, you mentioned the DAAT Manual. I want to direct your attention to Exhibit 524. Do you recognize this document?

A Yes. That is the—what's called the *DAAT Manual*. It's the Defensive and Arrest Tactics.

Q And again, you reviewed this document in connection with your review of the materials in this case?

[21] A Yes, that's correct.

Q Are you familiar with the term *active resistance*?

A Yes.

Q And are you aware of how Wisconsin training guides for corrections and law enforcement officers define active resistance?

A Yes. There's a specific definition in the documents that define active resistance for both corrections and law enforcement.

Q I want to direct your attention to page 41 of Exhibit 524.

MR. POSNANSKI: Your Honor, if we could publish this. I believe this has already been admitted into evidence.

THE COURT: 524?

MR. POSNANSKI: Yes.

THE COURT: It hasn't been admitted as a defendants' exhibit. Any objection to it?

MS. WARD: No, Your Honor. It's Plaintiff Exhibit 9, I believe.

THE COURT: Oh, all right. It's in as Plaintiff's Exhibit Number 9, so you can show it to the jury.

MR. POSNANSKI: Okay. Thank you.

BY MR. POSNANSKI:

[22] Q On page 141, do we find the definition of active resistance?

A Yes, we do.

Q And what is active resistance?

A The first paragraph introduces active resistance and makes a distinction between active and passive resistance. It says that active resistance involves the subject who is physically counteracting an officer's control efforts under circumstances in which the behavior itself, the environment in which the behavior occurs, or the officer subject factors create a risk of bodily harm.

The next paragraph talks about the criterion of active resistance or its threat means that in general, control devices would not be appropriate to use against verbal aggression or against people running away or against children or older persons unless reasonably justified based on the circumstances.

Q Okay. Is active resistance, is that concept unique to Wisconsin?

A No. It's a national concept.

Q You touched on it. Do you know whether this active resistance concept is consistent with how other states train their officers?

A Yes.

[23] MS. WARD: Objection. Relevance.

THE COURT: I'm sorry?

MS. WARD: Relevance objection.

THE COURT: Overruled.

THE WITNESS: This is consistent. Every state we go to we have to be aware of the various definitions for active resistance and passive resistance, and this is consistent with what we see nationally.

BY MR. POSNANSKI:

Q That first paragraph you read, it indicates the use of an electronic control device is appropriate to overcome active resistance or its threat?

A Yes, it would be.

Q So officers are trained that active resistances is sufficient justification for the use of a taser?

A Yes. Taser would be a device for active resistance. There's various what we would call levels of taser usage, so it could apply to a variety of active resistance patterns.

Q Based upon your review of the materials in this case, do you believe the officers were faced with active resistance?

A Absolutely.

Q Can you explain that?

A Reading the reports, the reports that I read [24] indicated the behavior of Mr. Kingsley. And the behavior of Mr. Kingsley, and I won't focus on all the behavior, but primarily became dead weight when they had to move him. Then they put him onto that bunk, basically the concrete bunk in the—I think it was receiving cell number 3. The video does show Mr. Kingsley sort of rearing up in this manner.

(Indicating) That's clearly active resistance. When you try to hold somebody down or hold them in place and they pull away, that would be active resistance.

So there's a number of times where you can watch throughout that video where Mr. Kingsley did offer the officers active resistance to which they had to then respond.

Q And as we saw, the definition of active resistance incorporates two concepts. You talked a little bit about the physical manifestations that Mr. Kingsley was, I guess, presenting the officers from your view of the materials. There's also an element of risk; is that correct?

A Correct.

Q And did you see from your view of the materials an element of risk to anyone?

A Well, there are several elements of risk, so yes, I saw several.

[25] Q And can you talk about that?

A In a correctional environment, any time you move prisoners there's some element of risk, albeit in most cases fairly minor. But in this particular case where we had active resistance, Mr. Kingsley was not cooperating in the removal of those handcuffs.

Now handcuff removal under the best circumstances is difficult. If I were to put my hands out like this and somebody just put handcuffs on them, coming in and getting that small key into the keyway and turning, that's going to take a moment or two. That's under the best of conditions. When you have somebody who's actively resisting and pulling against those cuffs, not only do you have to control the subject, but you also have to control the cuffs.

Now these were chain-style handcuffs. There's basically two types of handcuffs: *Chain*, which have this link chain going between the two handcuffs. And then we have what's called *hinged* handcuffs. Some of those had like a bicycle-type chain that allows the handcuff to fold, and others have like a barn door hinge, if you will. We didn't have that model.

So what we're really worried about in this case and what I was concerned about in this case, looking at the video, if you get your fingers—if a correctional [26] officer in the process of trying to uncuff that individual gets his fingers around the chain of that handcuff and the prisoner either intentionally or just inadvertently starts to move and your fingers get caught in the chain of that handcuff, high probability that's going to break the fingers, and in some cases, particularly in prisons, people are trained to take officers down using handcuffs. There's surveillance video of them practicing those techniques where you wrap the chain around the officer's fingers and jerk very quickly, which can amputate a finger or break a finger. That was one issue just in the removal of the cuffs. Because it's not simply putting the key in and turning it in one direction. If the handcuffs are double locked, you have to turn it one direction and then come back and turn it in the other direction. If they're not double locked, then you only turn it in one direction. But you're looking at a very small key going into a very small hole on the side or what's called the cheap plate of the handcuff.

The other issue is you have a confined area, and when you're in a very confined area—think about trying to manipulate somebody in your pantry. It's very difficult to do. So if the person rolls one direction or another, it could cause a correctional officer to [27]

strike his or her head against the wall. It could cause them to get injured with the concrete bunk, depending on what the prisoner did. If the prisoner was able to get up, might be able to kick or do something else to the officers.

And we also have the second part of this is the officers who are trained correctional officers have to also be aware of the risk to the prisoner because—

MS. WARD: Objection, Your Honor. This isn't in any of his expert reports.

THE COURT: I'm sorry?

MS. WARD: He's testifying outside his expert reports in this case. He didn't say anything about injury to the prisoner in either of his reports.

THE COURT: Sustained.

BY MR. POSNANSKI:

Q Based upon your training and experience, your review of the materials in this case, was the use of the taser in drive stun mode reasonable or unreasonable under the circumstances?

A In my opinion it was reasonable based on the circumstances.

Q Can you explain that?

A There was active resistance. The taser was used in what's called *drive stun mode*. D-r-i-v-e. Drive stun [28] mode is where you take the cartridge off the end of the taser. There's two contact points. They're 40 centimeters apart. And what you do is apply the contact points to a muscle mass. And it's designed under an umbrella, which is a common term in the law enforcement business called *pain compliance*. All it does is produce pain. It doesn't cause neuromuscular

incapacitation. If the device is shot, if the taser were shot in what's called *probe mode* and the probes go out and they're tethered back to the device, that causes neuromuscular incapacitation, which will cause the affected area to lock up.

This doesn't do that. This is just for pain compliance. It's localized. The recommended areas are large muscle masses, or in some cases if somebody had an arm underneath them and they were on their stomach, you could apply it to the tricep area of the arm to get the arm to come out.

Q Do you hold this opinion to a reasonable degree of certainty?

A Yes.

Q From your view of the materials in this case, are you aware that the plaintiff's expert, Brian Landers, has taken issue with the placement of Sergeant Hendrickson's knee on Mr. Kingsley in the receiving

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 11/05/12]

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF FOURTH
DAY OF JURY TRIAL
HELD BEFORE DISTRICT JUDGE
BARBARA B. CRABB, and a jury

October 17, 2012
9:00 a.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould
BY: EDWARD PARDON
WENDY WARD
JOEL GRAHAM
10 East Doty Street, Ste. 600
Madison, Wisconsin 53703

For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
TIMOTHY POSNANSKI
One East Main Street
Madison, Wisconsin 53703

* * *

[70] MS. WARD: Okay.

THE COURT: Okay. Then taking the post-trial instructions, first one is just the introduction.

Secret deliberations.

The need for a unanimous verdict, et cetera.

Then the burden of proof.

Preponderance of the evidence. I'll just keep going. If you have an objection, speak up.

Answers not based on guesswork.

Number of witnesses.

All persons equal before the law.

Impeachment by conviction of a crime. I believe the impeachment part, I think that raises questions.

Just the heading will be conviction of a crime.

MR. PARDON: Okay.

MR. JONES: So not impeachment by conviction of a crime.

THE COURT: Huh?

MR. JONES: I was trying to clarify what Your Honor had said. You mean take out impeachment by.

THE COURT: Right. I just think that's a little bit confusing in this instance. It explains in the instruction you may use that evidence; that is, that

he's been convicted of crimes, to help you decide whether his testimony is truthful and how much weight to [71] give to his testimony.

MR. JONES: So you're just talking about changing the heading.

THE COURT: Just the heading, yeah.

MR. JONES: No objection.

MR. PARDON: Could I make a suggestion?

THE COURT: Yes

MR. PARDON: I think that there was some back and forth about whether the evidence could be whether Mr. Kingsley had been convicted of a felony or six felonies and the way it say here, it says *convicted of crimes*. I'm wondering if it could just say convicted of a felony or just convicted. Because the evidence wasn't—

THE COURT: Convicted of a felony. Any objection to that?

MR. JONES: Well, given Your Honor's ruling about what was permissible, without waiving our earlier objection to that ruling.

THE COURT: All right. Then multiple defendants.

You must give separate consideration to each claim and each party.

Okay. And now the special verdict question we get into the definition of excessive force. And was this [72] what you put on the bench?

MS. WARD: Yes, Your Honor.

THE COURT: This is from the Seventh Circuit?

MS. WARD: Yes. Do you want me to address the question now?

THE COURT: Sure.

MS. WARD: Okay. So we would just like to request that the originally proposed post-trial jury instructions be used because we submit that there isn't a separate subjective element for the instruction for excessive force in the Seventh Circuit. There are a number of Seventh Circuit pretrial detainee failure to protect or conditions of confinement cases in which a separate determination of intent is articulated. In those cases, the necessary level of intent is deliberate, callous indifference and reckless disregard. However, in excessive force cases, the conduct will always be intentional. So there's a distinction between a failure to protect where, for example, a prisoner is beaten by other prisoners and then the level of intent comes into question because it's whether the prison officials, it accidentally happened on their watch or they egged it on, and that's when the level of intent becomes an issue.

But in an excessive force case, the conduct will [73] always be intentional. Indifference or disregard makes no sense. And in that respect, Your Honor, we submit that the way the jury instructions are currently worded is confusing.

In the Fourteenth Amendment context, excessive force is any force that is determined to constitute punishment, and the Seventh Circuit has squarely held in *Wilson v. Williams* that intent to punish can be inferred from the objective factors used to determine whether a use of force is unreasonable. That holding of *Williams* is set forth in the Seventh Circuit Pattern Instruction 708 and 709, which we provided to Your

Honor, and those are the instructions on which we based our proposed instructions.

In *Wilson*, the Seventh Circuit held that the trial court's jury instruction was not inappropriate in the Fourteenth Amendment context where that instruction stated the test was objective on reasonableness. That was the holding of *Wilson*.

The Court in *Wilson* also held that even if the test for excessive force is not wholly objective, the jury can rely on those objective factors to infer intent, and the fact that a separate subjective element isn't a part of the excessive force standard in the Seventh Circuit is also shown in pattern instruction 709, which [74] expressly states that "in deciding whether the defendant's use of force was unreasonable, you must not consider whether the defendant's intentions were good or bad."

And I want to draw the Court's attention to two additional cases that we also provided to Your Honor and those are *Titran v. Ackman* and *Davis v. Peoria County*. In *Titran*, the Seventh Circuit held that most of the time the propriety of using force on a person in-custody pending trial will track the Fourth Amendment. The court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them.

In the *Davis* case that we provided to Your Honor, the Central District of Illinois analyzed the Seventh Circuit law on this issue and found that reasonableness is the key analysis for both pretrial detainees and arrestees. The court there referred to the intent element as just the intent to use force.

THE COURT: So, you have no objection to the proposal for No. 1, defendants used force on plaintiff.

MS. WARD: No. 1 of the special verdict?

THE COURT: I'm talking about—

MS. WARD: Oh, yes. Correct. Yes, Your Honor.

THE COURT: Then defendants' use of force was [75] unreasonable in light of the facts and circumstances at the time.

MS. WARD: Correct. We have no problem with that either.

THE COURT: Okay. So it's the third one. That defendants knew that using force presented a risk of harm to plaintiff but they recklessly disregarded his safety by failing to take reasonable measures to minimize the risk of harm.

MS. WARD: Right. And it's that that we submit is confusing. The *disregard of plaintiff's safety* is confusing in the context of an excessive force case where they were deliberately applying force.

So we would suggest eliminating 3, and also we had an argument for eliminating 4 as well.

THE COURT: I'm sorry, for eliminating?

MS. WARD: No. 4. The defendants' conduct caused harm.

THE COURT: Well, let's stick with No. 3.

MS. WARD: Sorry to jump ahead.

THE COURT: Mr. Posnanski.

MR. POSNANSKI: Yes, Your Honor. We would reiterate our request for the initial pretrial instruction we submitted on the excessive force issue. But to write intent completely out of the instruction I [76] think flagrantly violates what *Wilson* tells us. *Wilson*

specifically says the standard is neither wholly objective nor wholly subjective. Plaintiff wants to remove that subjective element in its entirety.

The language that *Wilson* specifically approved right from the middle of its discussion of the appropriate standard in an excessive force case involving a pretrial detainee states that "a plaintiff must prove the defendants acted deliberately or with callous indifference evidenced by an actual intent to violate the plaintiff's rights or reckless disregard for his rights." And then it goes on to cite two other Seventh Circuit cases with approval for the basis for that language.

I think this language properly instructs the jury to include the intent of the officers and provides them the appropriate parameters with which to assess the officers' intent. It doesn't come from the Wilson discussion of a prison security context, it's regarding the appropriate standard to evaluate excessive force brought by a pretrial detainee like Mr. Kingsley.

I think 3 should actually be bolstered with the actual language used by *Wilson* would be our position.

THE COURT: What would you propose?

MR. POSNANSKI: So it would read: The [77] plaintiff must prove defendants acted deliberately or with callous indifference evidenced by an actual intent to violate the plaintiff's rights or reckless disregard for his rights.

MS. WARD: Your Honor, can we respond to one point that Mr. Posnanski just raised?

THE COURT: Yeah. I'm just getting this in front of me so that I know what we're talking about.

MS. WARD: Okay.

THE COURT: Would you say that again?

MR. POSNANSKI: The direct quote is "Plaintiff must prove that defendants acted deliberately or with callous indifference evidenced by an actual intent to violate the plaintiff's rights or reckless disregard for his rights." And that's from *Wilson v. Williams* at page 875. It's 83 F.3d 870. That comes from page 875.

THE COURT: And Ms. Ward.

MS. WARD: For No. 3, I mean we agree that it is not wholly objective; that there is an intent element. But it's only the intent to use force. So we would not object to *defendants intended to use force*.

With respect to what Mr. Posnanski—I'm sorry, I'm going to butcher your name—just told the Court, what he quoted to you was not the holding of *Wilson*. It was, in fact, a quote of *Anderson v. Gutschenritter* [78] which the court was citing in *Wilson*, and *Anderson* is a failure to protect case. So that is exactly in line with what we just presented to the Court.

THE COURT: I want to look at *Wilson*. I'm really pretty much persuaded to give what I've already got, but I wanted to ask you, Ms. Ward, why do you think that we don't need an element about whether harm was caused to the plaintiff?

MS. WARD: Again, looking at the pattern instructions from the Seventh Circuit, yesterday the defendants in their Rule 50 motion, they argued that Mr. Kingsley was injured, and we submit that in the Seventh Circuit, injury isn't a required element of an excessive force claim. I think the use of harm is an element. Element would suggest to the jury that a lasting injury or a severe injury is required and that's not the law in the Seventh Circuit. There's a number

of cases and pattern instruction 708 that are directed exactly to this issue. And if they're going to argue that lasting injury is a requirement and then the instruction says harm, the jury thinks that that harm needs to be a lasting injury. If there's any suggestion that *de minimus* force or nonlasting injury isn't good enough, we would submit that would be an incorrect statement of the law. And in fact, in one of those [79] cases cited in the pattern instruction, the force used was a shove and a poke and the court said that was a sufficient injury to constitute harm.

THE COURT: Well, he has testified it was painful.

MS. WARD: Yes, Your Honor. If there was a clarifying instruction with *harm*, that pain is considered harm, we wouldn't have a problem with that. It's just the extent that they're going to argue and there will be any suggestion to the jury that some form of lasting injury is required under the law, that's what we would have the objection to.

Your Honor, Mr. Pardon just reminded me as well that it's confusing also with respect to the punitive damages standard.

THE COURT: I think I'll add "a person can be harmed even if he does not suffer a lasting injury or..."

MS. WARD: Or severe injury.

MR. POSNANSKI: Your Honor, I think the language used in *Wilson* says some harm. That was the instruction that was approved in *Wilson*. It certainly doesn't raise to the level of severe injury. That also comes from page 876 of *Wilson*.

THE COURT: So you're suggesting if I just said [80] "For the fourth element defendants' conduct caused some harm..."

MR. POSNANSKI: I think that would be appropriate. And then in addition to the factors that the jury is instructed to consider, one of those elements is the extent of the plaintiff's injuries. So they are instructed to take that into consideration.

From our perspective it's certainly not inappropriate to argue the extent of the plaintiff's injury. It's one of the elements of the case. It's one of the elements the jury is going to have to consider.

THE COURT: And the plaintiff can argue that, as I'm going to say, that a person can be harmed even if he does not suffer a severe injury. Okay. We'll stick with what I have with the addition of "a person can be harmed even if he does not suffer a severe injury."

And then the damages questions. Compensatory damages, anything about those?

MR. PARDON: Are you including or not including a statement about nominal damages?

THE COURT: I will. It's at the bottom of the paragraph on page five. "If you find in favor of plaintiff on Question No. 1, but find that he's failed to prove he suffered any compensatory damages, you should enter one dollar in nominal damages."

[81] MR. PARDON: Okay. We would ask that you not include that for the same reasons we had stated earlier, which is that it actually—it invites that outcome. There's already an instruction about the particular type of damages that we're asking for and we don't think it's necessary. So we're just renewing our objection.

THE COURT: Where did you have that, that proposal?

MR. PARDON: Originally in our objections to jury instructions.

THE COURT: Oh, in your objections.

MR. PARDON: Yeah.

THE COURT: What page was that? I'm having trouble finding it.

MR. PARDON: I'm sorry, page eight.

THE COURT: Page eight?

MR. PARDON: I don't have a docket number in front of me. Does Your Honor have our objections, our original objections?

THE COURT: I thought I did. Docket No. 117, Plaintiff's Objections to Defendants' Proposed Jury Instructions.

MR. PARDON: That sounds right, yeah. Page eight of that under B. It's the last part of the paragraph.

[82] THE COURT: Oh, I see. Okay. The jury can ignore any evidence of harm and instead split the—

MR. PARDON: Right, yes.

THE COURT: Okay. But that's what we're doing here. First of all we're asking the jury to find was there harm caused, and then asking them to consider in the damages portion what that harm amounted to. So I'm not sure—you say consider liability first and then consider damages and I think that's what we're doing.

MR. PARDON: I understand that. I just think that this instruction, within the context of damages, even suggests that they can go back and not find liability and split the baby. I'm sorry, that they can—they can suggest that they can say—it invites them not

to award an amount of damages, but just to say—when, in fact, they may otherwise have, because they don't need to be told they can use one. They can figure out one. I guess that's what I've been trying to say here. They don't need to be told you can award a dollar. I mean they can figure out that they can award a dollar.

THE COURT: If you want it out, I'll take it out, because I think it's something that's favorable to the plaintiff.

MR. POSNANSKI: We would request that it stay [83] in, Your Honor, because it's part of the standard instruction from 7.23 from Seventh Circuit pattern instructions.

MR. PARDON: All right. Leave it in.

THE COURT: We'll leave it in. Do you want the inserts—

MR. PARDON: Your Honor, I'm sorry. May I consult with my client for ten seconds?

THE COURT: Of course you can.

(Discussion off record at 10:54 a.m.)

MR. PARDON: Thank you, Your Honor. I apologize. You can leave it in.

THE COURT: Do you think we need the instruction on income taxes in this case?

MR. PARDON: No.

THE COURT: Defendants?

MR. JONES: I'm sorry. Just one second, Your Honor. I'm reading it again.

THE COURT: Sure.

(Pause at 10:54 a.m.)

MR. JONES: We're okay with taking it out.

THE COURT: Okay. And then if you'd look over the instruction on punitive damages.

MR. JONES: Just as a question, Your Honor. What we're looking at are the instructions that you [84] handed out to us, provided to us at the Final Pretrial Conference.

THE COURT: Right.

MR. JONES: Okay.

MR. POSNANSKI: We have no problem with the punitive damages instruction.

THE COURT: Okay.

MR. JONES: Without waiving, however, Mr. Posnanski's earlier motion.

THE COURT: Right. Any problem with the punitive damages?

MR. PARDON: No, Your Honor.

THE COURT: Okay. And then the final one is just selection of the presiding juror and communicating with the judge.

MS. WARD: No issues with that one.

THE COURT: Okay.

MR. POSNANSKI: We have no problem with that. We have two issues: One we'd like to raise and one we'd like clarification on.

THE COURT: Okay.

MR. POSNANSKI: We would request that the jury be given a limiting instruction concerning the

evidence of officers' compliance with training and policy. That comes from Seventh Circuit pattern instruction 7.04. [85] Given the evidence that came in in this case regarding whether or not the officers complied with or violated their training, I think it's appropriate to instruct them that compliance violation of that training is not a constitutional violation. The issue is whether the officers used excessive force on Mr. Kingsley.

We have a proposed instruction. It follows closely with the model instruction.

THE COURT: Why don't you bring that up to me.

MS. WARD: Do you have a copy? Thanks.

THE COURT: Thank you.

MS. WARD: Your Honor, this isn't exactly what's in the Seventh Circuit pattern instructions. I was just wondering if I could ask for clarification where they modified the pattern instruction from what was in—normally that's shown by marking it and there's no marking here. I'm not trying to be picky, I just want to know what they did to the Seventh Circuit pattern instruction.

MR. JONES: I believe Mr. Posnanski is marking as we're paused here. I don't think the intent was to materially change the instruction at all.

THE COURT: Okay.

MS. WARD: We don't think the instruction is needed. I mean even without seeing what the markings [86] were, the issue of whether they complied with their training is part of the totality of the circumstances, which I think is adequately instructed in the excessive force and unreasonable

force definition, especially the unreasonable force factors that the Court is providing already.

MR. POSNANSKI: Your Honor, the Seventh Circuit, this instruction is black letter law approved. I mean it's appropriate where plaintiff comes in arguing that, as we have here, the officers failed to comply with their training. The Advisory Committee comments "this instruction should be given if evidence was admitted at trial about compliance with the statute, rule or regulation." We have that.

Under the circumstances here, this instruction is appropriate to ensure there's no confusion that just because the officers may have training, they commit—they use excessive force.

THE COURT: I'm going to check—I'm going to check this out with the Seventh Circuit Handbook and see. Anything—you said you had one other thing?

MR. POSNANSKI: Yes, Your Honor. If we could just have clarification on what language is going to be added to the jury instruction regarding harm.

THE COURT: Oh, yes. Right. It is: "A person [87] can be harmed even if he does not suffer a severe injury."

MR. POSNANSKI: Thank you.

THE COURT: All right. I'll take these upstairs so we can get them amended and we'll resume at 11:15. We'll resume without the jury first.

(Recess 11:00-11:15 a.m.)

THE COURT: Okay. If you turn to page five—four, I inserted "a person can be harmed even if he did not suffer a severe injury." And then added the paragraph, "You've heard evidence about whether the

defendants' conduct complied with or violated their training..." And then "If you find the plaintiff has failed to prove any element of the excessive force claim..."

Anything else on instructions or verdict form?

MR. PARDON: No, Your Honor.

THE COURT: All right.

MR. JONES: There was just the one remaining issue about this Exhibit 512 and whether it should be redacted or not.

THE COURT: Oh, right.

MR. JONES: And I guess I would just take the position that I don't feel it's necessary to redact the exhibit or even appropriate. It went in without

* * *

PRINCIPLES OF SUBJECT CONTROL

A Training Guide for Jail and Detention Officers

[Seal]

Wisconsin Department of Justice

Law Enforcement Standards Board

June, 2009

[Exhibit 517]

* * *

INTRODUCTION

As a jail officer, you will have continuing contacts with inmates in your custody. Your main job is to supervise inmates to try to ensure their security and safety and to maintain good order and control in your facility. Your duties will require you to exert control over inmates by giving orders, directing their movement, disciplining them, and so on. Your goal is always to get inmates to comply voluntarily. If they do, you will have achieved your objective without making the encounter unnecessarily adversarial, and without risk of injury to officers, inmates, or others.

Unfortunately, even the best efforts of the most skilled officer to gain voluntary compliance do not always work. Sometimes you will have to use physical force to achieve control and accomplish your legitimate correctional objectives.

In Wisconsin, the trained standard for such use of force in a correctional setting (prison, jail or secure juvenile detention facility) is Principles of Subject Control (POSC). In POSC training, you will learn when and how to use verbalization skills and, if

necessary, physical force to control subjects. POSC techniques are psychomotor skills, meaning that they involve both the brain and the muscles. For that reason, you will spend much of your time practicing the verbal and physical techniques—learning the skills first in isolation, and then applying them in simulations.

POSC is the correctional application of Wisconsin's system of Defensive and Arrest Tactics (DAAT), which is the trained standard for use of force by law enforcement officers. The two systems are very similar in regard to their premises, concepts, and components. DAAT training is designed to train law enforcement officers to use force appropriately to accomplish legitimate law enforcement objectives in the environment in which they work, whereas POSC training is designed to train corrections officers to accomplish legitimate correctional objectives in the environment in which they work.

The definition of both DAAT and POSC is:

A system of verbalization skills coupled with physical alternatives.

This means that both law enforcement officers and jail officers are always expected to try to accomplish their objective of control through use of verbal skills whenever possible, and only to use physical force when the use of verbal skills either has not worked or would clearly be inappropriate in a given situation. Getting a subject to comply through talking is always preferable to getting a subject to comply through physical force, but there are times when physical force is necessary.

USE OF FORCE IN A CORRECTIONAL SETTING

You must know several key concepts to understand and properly apply the POSC system. These are listed in this section and discussed in greater detail in subsequent sections of this text.

The key concepts are these:

- Force may only be used to achieve legitimate correctional objectives
- Legal standards govern and limit the use of force
- In an institutional setting, the need for use of force may be reduced by various factors
- In Wisconsin, POSC is the basis for use of force in a correctional setting
- Corrections personnel must be able to articulate their use of force orally and in writing

This text explains the POSC system, use of which may involve just one officer or multiple officers. However, higher-risk incidents may require use of specialized teams.

A *Correctional Emergency Response Team* (CERT®) may be activated in a situation in which use of a specially trained team of officers is required to achieve a legitimate correctional objective. For example, CERT® personnel might be activated in a cell extraction situation or to respond to a disturbance involving a number of inmates.

Another type of specialized team, a *Special Weapons and Tactics Team* (SWAT), might be activated in a more serious emergency, such as a hostage situation, in which the application of deadly force may be required. SWAT members carry firearms, while

CERT® members generally do not. Both CERT® and SWAT require specialized training beyond basic POSC training.

PURPOSES FOR USE OF FORCE

As a corrections officer, you are authorized to use physical force to accomplish legitimate correctional objectives including ensuring security and safety and maintaining order and control. Legitimate objectives for use of force would include:

- to gain control of a resistive or combative inmate
- to defend yourself from physical assault
- to defend others (other officers, inmates, visitors, etc.) from physical or sexual assault
- to prevent inmates from escaping
- to move an unwilling inmate from one location to another
- to prevent an inmate from harming himself or herself
- to prevent destruction of property

If you use physical force against an inmate for a purpose other than one of those listed above, it might be considered inappropriate or excessive use of force. Examples of inappropriate purposes for use of physical force include:

- punishing an inmate for a violation of jail rules
- "getting back" at an inmate for something which he or she said or did
- giving an inmate a "message" that you are the authority figure

As noted, part of your job is to articulate your use of force, both orally and in writing. A key element of that is articulating the reason you used force. You have to be able to show that you used force for an appropriate reason—that your decision to use force was justified.

LIMITS ON THE USE OF FORCE

A number of legal standards govern and limit the proper use of force by correctional officers. These include the U.S. Constitution, Wisconsin Statutes, Wisconsin Administrative Codes, and agency policies and procedures. In addition, the training that you receive establishes a standard for the proper use of force. The following addresses each of these.

The U.S. Constitution

Inmates have certain basic constitutional rights. The application of constitutional rights to particular situations is determined by decisions of the federal courts, primarily the U.S. Supreme Court and the circuit Courts of Appeal. A basic constitutional right of all citizens, including inmates, is to be free from inappropriate or excessive use of force. This right arises out of various Amendments to the U.S. Constitution (see Appendix A).

Which amendment applies to use of force in a correctional setting depends on the custody status of the person:

- The Fourth Amendment standard applies to free persons, which would include persons arrested but not yet booked.
- The Fourteenth Amendment standard applies to pre-trial detainees.
- The Eighth Amendment standard applies to convicted inmates.

These standards are discussed in more detail in the next sections.

The Fourth Amendment. The first standard is the Fourth Amendment "objective reasonableness" standard. Any time force is intentionally applied to a free person, the force is considered a "seizure" under the Fourth Amendment. Therefore the force used must be objectively reasonable in light of the facts and circumstances confronting the officer at the moment the force is used. The objective reasonableness standard would apply to persons just off the street or in a holding area prior to booking.

The Fourteenth Amendment. The second constitutional standard is set by the Fourteenth Amendment's "due process" clause. The Fourteenth Amendment is violated by actions that "shock the conscience." Force intended in some way to injure, unjustified by any governmental interest, could rise to the level of conscience-shocking. The Fourteenth Amendment applies to pre-trial detainees rather than to sentenced inmates.

The Eighth Amendment. The third constitutional standard is the Eighth Amendment "cruel and unusual punishment" standard. Unnecessary and wanton infliction of pain and actions taken in bad faith, for no legitimate correctional or penal purpose would be considered cruel and unusual punishment. The Eighth Amendment standard applies to people who have been found guilty, convicted and sentenced to serve time in jail. Only convicted inmates are in jail as a form of punishment, which is the focus of the Eighth Amendment.

You may not know the custody status of the inmate with whom you are dealing, nor are you expected to

use force differently depending on the custody status of an inmate. For these reasons, the training standard used in POSC is the most restrictive of the three—the Fourth Amendment "objective reasonableness" standard. The following explains this standard in more detail.

Even when force is justified because it is used to accomplish a legitimate correctional objective, the level and amount of force used must be appropriate. The legal standard requires that the level and amount of force must be "objectively reasonable" under the particular circumstances. This standard originated in a 1989 decision by the U.S. Supreme Court in the case of *Graham v. Connor*.[1] This case had to do with use of force by law enforcement officers, but the standard applies to use of force by corrections officers as well. Essentially, this standard measures an officer's use of force by comparing it to actions that have been or would be taken by another officer with similar training in similar circumstances.

The legitimate purpose of your use of force is control, and control is a perception based on training, experience and the totality of circumstances in a particular fact situation. *Graham v. Connor* recognizes that situations vary, and sets forth several criteria to be considered in deciding whether a particular use of force was reasonable. These include:

- whether the person on whom force was used posed an imminent threat to safety
- whether the person was actively resisting or attempting to flee

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[1] 490 U.S. 386, 109 S. Ct. 1865 (1989)

- the severity of the alleged crime at issue

If a use of force comes to trial, the courts generally examine the following questions:

1. Was there a need for force in the first place to accomplish a legitimate correctional objective?
2. If the use of force was appropriate, was the amount and type of force used appropriate in the particular situation?
3. If the use of force was inappropriate or excessive, was it so great that it violated the Constitution or state law?

In the past, an inmate had to prove that he or she received a significant injury as a result of the force in order to win a lawsuit alleging a violation of constitutional rights. However, in a 1992 ruling, the U.S. Supreme Court revised that standard. In *Hudson v. McMillan*,[2] the Court ruled that an inmate need not prove that he or she suffered significant injury—only that he or she suffered "wanton and unnecessary infliction of pain." The Court also said that when force was used "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain and restore discipline," such force could be deemed excessive. In other words, if a jail officer uses force for a reason unrelated to a legitimate correctional objective, that force could violate the inmate's constitutional rights—regardless of whether the inmate was injured.

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[2] 503 U.S. 1, 112 S. Ct. 995 (1992)

Wisconsin Statutes

Several Wisconsin statutes address the issue of use of force, including in correctional setting.

Misconduct in Public Office (§946.12 Wis. Stats.) covers actions by all public sector employees. Certain categories of misconduct could apply to inappropriate uses of force:

- failing to perform a ministerial (non-discretionary) duty within the time or in the manner required by law
- exceeding lawful authority or acting in a way forbidden by law
- exercising a discretionary power in a way inconsistent with one's duties or the rights of others with intent to obtain a dishonest advantage
- intentionally making a false entry in an official record

For example, if an officer intentionally used excessive force (exceeding lawful authority), or refused to follow agency policy on use of force (failing to perform a ministerial duty), or intentionally falsified a use-of-force report (false entry in an official record), that officer could be found to have violated the provisions of this law.

Abuse of Residents of Penal Facilities (§940.29 Wis. Stats.) reads in part:

"Any person in charge of or employed in a penal or correctional institution or other place of confinement who abuses, neglects or ill-treats any person confined in or a resident of any such institution or place or who

knowingly permits another person to do so is guilty of a Class 1 felony."

This law applies to people who work in state prisons, county jails, and secure juvenile detention facilities, among others. It reinforces the concept that use of force is only to be used to achieve legitimate correctional objectives. Inappropriate use of force could constitute "abuse" under the provisions of this law.

Note that a jail officer who uses inappropriate or excessive force against an inmate could be held both criminally and civilly liable for the same offense. The officer's actions could result in a criminal conviction under §940.29 Wis. Stats., *and* civil liability for violating an inmate's constitutional (civil) rights.

Note too that §940.29 Wis. Stats., prohibits knowingly permitting someone else to abuse, neglect, or ill-treat an inmate or other person. If you observe another officer using physical force inappropriately or excessively, you have a legal obligation to try to stop it. This duty is based on the concept that there are "no innocent professional bystanders"—once you arrive on scene, you have a duty either to assist with what is going on (if it is legitimate) or stop it (if it is not legitimate). If a use of force is legitimate but being carried out incorrectly or excessively, you have a duty to step in to fix it, make the technique better, or stop it. Your duty to act also takes into account the concept of "contact officer override," which holds that an officer has a duty to intervene with the inappropriate or unlawful actions of peers or supervisors.

Law Enforcement Officer: Failure to Render Aid (§940.291 Wis. Stats.)[3], requires you to provide or make arrangements for first aid to anyone in your custody who is in need of it. As with §940.29 Wis. Stats., it also prohibits knowingly permitting someone else to withhold needed first aid. Clearly this law requires that you provide necessary care to an inmate or other person following a use of force. As you will see, provision of first aid is part of "Initial Medical Assessment," which is one of the steps in the First Responder Philosophy, one of the fundamental concepts behind POSC.

Technically, this law only applies to "peace officers." In a jail or detention setting in Wisconsin, that would include deputies working in the facility, but not civilian employees. However, the same principles apply to all corrections officers, sworn or civilian.

Wisconsin Administrative Code

DOC 350.14 Wis. Adm. Code specific requirements regarding use of force. The section reads as follows:

1. *Jail staff may use physical force against an inmate only if force is necessary to change the location of an inmate or to prevent death or bodily injury to the staff member, the inmate or someone else, unlawful damage to property or the escape of an inmate from the jail. Staff may*

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[3] This statute reads in part, "*Any peace officer, while acting in the course of employment or under the authority of employment, who intentionally fails to render or make arrangements for any necessary first aid for any person in his or her actual custody is guilty of a Class A misdemeanor if bodily harm results from the failure. . A violation for intentionally failing to render first aid under this subjection applies only to first aid which the officer has the knowledge and ability to render.*"

only use the amount of force reasonably necessary to achieve the objective for which force is used. Corporal punishment of inmates is forbidden.

2. *Any staff member who has used force to control an inmate or inmates shall submit a written report to the sheriff, jail administrator or the staff member's immediate supervisor describing the incident. The report shall include all relevant facts."*

Note that the requirements under Part 1 of this section mirror the basic constitutional requirements discussed earlier.

Agency Policy and Training

Policy. Your employing agency has a comprehensive set of written policies and procedures that describe how correctional officers are expected to carry out their duties and responsibilities—including with regard to use of force. Your agency's policy may be *more* restrictive than Wisconsin law or Administrative Code, but it cannot be *less* restrictive. You need to know your agency's policies on use of force and always try to act according to such policies. Not only do your policies indicate what your employer wants you to do, but they also provide protection in the event of a civil lawsuit.

If you are acting within the scope of your employment, you are indemnified against individual liability in the performance of your duties, according to provisions of Wisconsin law under §895.46 Wis. Stats., *State and Political Subdivisions Thereof to Pay Judgments against Officers*. If someone brings a lawsuit against you for a use of force incident, as long as you were acting within the scope of your

employment, the county—not you—will face the liability. You will not have to hire a lawyer or pay any money damages that arise from the lawsuit.

On the other hand, if you act outside the scope of your employment (defined in part by policy) you could face individual civil liability. If someone brings a lawsuit and you lose, you (or your insurance company) could have to pay the judgment.

Your agency's use of force policy most likely also addresses use of force reporting. It may indicate the specific report form(s) to be completed following a use of force incident, when such reports are to be completed, where they are to be routed, and so on. Again, know and follow these policy requirements as carefully as possible. In the event of a lawsuit, your use of force report will be crucial because it is your formal justification of the actions taken during a use of force incident.

Training. POSC is the standard for basic (recruit-level) use of force training for jail officers and secure juvenile detention officers in Wisconsin. Remember that the standard established by the U.S. Supreme Court in *Graham v. Connor* is that force must be "objectively reasonable" in order to be legally justified, and that such reasonableness is generally measured against what another officer with similar training would do in similar circumstances. In Wisconsin, POSC is the state-approved standard for training. That means your actions in a use-of-force incident will be measured against what you learned to do in your POSC training. In a lawsuit, POSC trainers may be called upon to serve as witnesses—to review what happened in a use-of-force incident and if qualified as an expert, to give an opinion about whether or not officer actions were in accordance with POSC concepts

and techniques. If expert witnesses feel that an officer's actions *were* in accordance with what was taught in POSC, then it is easier to show the reasonableness of the use of force.

From a liability risk management perspective, the best thing, of course, is for an officer to apply trained POSC techniques exactly as learned during training. However, that is not always possible or feasible. Fortunately, the legal system recognizes that fact and takes it into account in judging use-of-force actions by law enforcement or corrections officers. Thus, use of force by an officer may be legally justifiable in one of three ways:

- It is a trained technique applied just as trained
- It is a dynamic application of a trained technique
- It is a technique not trained but justified under the circumstances

In some circumstances, you can apply a technique learned in POSC just as you were trained to do. Your execution of the technique mirrors the classroom model. Often, however, that is not possible because the situation is rapidly changing. As a result, the force used is a variation of some sort of the trained tactic or technique—close, but not perfect. For example, in a dynamically evolving situation involving an unarmed strike, you may not have been able to strike the specific trained target area, despite your best efforts to do so.

In some circumstances, you may end up applying a force tactic that you were never trained to do. While it is certainly preferable always to use trained techniques, there may be times when a non-trained technique is justifiable. For example, if a jail officer is

being assaulted by a group of inmates, that officer may have to use any available object, such as a radio or a flashlight or a piece of furniture, to defend himself or herself. Use of such objects is not trained in POSC, but the officer's use of them might be legally justified because he or she was acting in self-defense and a tactical evaluation dictated a level or amount of force that was not available via trained technique.

Aside from basic (recruit-level) training, you may receive use of force training within your agency, or sponsored by your agency. Such training may or may not be based on the POSC system. If not, then such training also establishes a legal standard to which you may be held.

FACTORS INFLUENCING THE USE OF FORCE

There are a number of factors that may influence the use of force in a correctional institution, such as a jail. These factors may mean that application of force may not be necessary—at least immediately—or, if force is necessary, may influence the level and amount of force needed to establish control. These factors include the following:

- *The need for physical force may be reduced in a controlled environment.* Officers in a jail or detention setting control the physical environment. They control physical access to the facility, and also control the items that inmates are allowed to possess. Thus, if good security measures are followed, it is less likely that inmates will have access to weapons or other potentially-dangerous items.
- *Background information on inmates aids in classification and may prevent use of force incidents.* This allows jail staff members to

identify potentially violent or otherwise troublesome inmates and to house them in areas of the jail where it is easier to minimize problems and to more effectively supervise them.

- *The physical design of a facility may aid in the isolation of problem areas.* If there is a disturbance emergency, the physical environment of a jail makes it easier to close off (isolate) areas where such emergencies are occurring (such as cells, cellblocks, dayrooms, dorms, pods, etc.), thus containing the problem area until adequate help can arrive to deal with the situation effectively.

- *Use of verbalization skills in the controlled environment of a jail often defuses situations, so that physical confrontations may be unnecessary.* Proper use of Correctional Professional Communication Skills is very important in a jail or detention setting. Verbal communication should be used whenever possible to gain or regain control, rather than physical force. This is often more feasible in a jail than it is on the street. Sometimes, verbalization may include an implied to use force, as discussed below. Verbalization will not always work to gain or regain control, but should always be tried first.

- *Surveillance technology aids in early detection and suppression of situations that require the use of force.* The use of cameras, intercoms, and other monitoring devices allows staff the opportunity to detect possible problems early, and to assist in getting help to the scene in a timely manner. Such technology may also assist

in properly documenting incidents. Closed-circuit televisions, of course, are only useful if someone is watching the monitors carefully.

- *Multiple officer response, when available, can minimize the need for use of force options.* Correctional disturbance emergencies can often be handled using a team response. In many cases, the application of physical force can be avoided through use of a "show of force" by officers. Or, when force is needed, a team response may mean that use of less intrusive physical control tactics are possible.

- *There is often the ability to control some situations with a threat of force, aside from multiple officer response.* If an inmate does not comply with an order or directive, a threat of force or implied threat of force may be effective to get the inmate to comply. As noted, multiple officer response is one type of "show of force." But there are other types of threat as well. For example, if an inmate sees that an officer has O.C. aerosol spray or an electronic control device, the implied threat that such weapons will be used may be enough to gain the inmate's compliance. An inmate may posture before submitting. Using actual or implied threats might be appropriate when you do not need to immediately intervene with application of force. Of course, you must have the capacity to follow through on any threat or implied threat to use force.

- *The ability to wait out potential violent confrontations and control the moment of initial contact may reduce the need for physical force options.* There are some situations in which

immediate intervention is necessary, but there are many situations in which that is not the case. For example, if an inmate refuses to exit a cell or room, you do not always need to immediately perform a cell extraction. If the inmate is locked in the cell, you may be able to give him or her time to think about it. If there is no immediate peril or danger, use of force can sometimes be avoided or at least be delayed.

- *In a correctional institution, rule violations result in disciplinary action rather than an arrest process, which often leads to physical confrontations.* Inmates are already in custody, so arrests are not an issue. Disciplinary procedures to deal with inmate behavior can be done in a less stressful, less immediate, and therefore less dangerous manner. If the jail's disciplinary system is fair and consistent, inmates are more likely to comply with rules.
- *It is often possible to seek supervisory advice or intervention before actually using force.* In many situations in a jail setting, there is time to seek the input and/or assistance of a supervisor before applying force. A supervisor may be in a better position to determine the need for use of force at all, or may be authorized to determine the appropriate level of force to use if force is necessary. Again, this is a factor *if* there is time to seek such assistance, in a given situation.

Knowing these factors influencing the use of force is important for you in order to understand proper use of force in a jail or detention setting. This is because, as noted above, the factors listed may limit the need for application of physical force or they may mean that a

lesser level and amount of force is required in order to achieve a legitimate correctional objective.

This material is based on an article by Gary T. Klugiewicz, "Factors That Influence the Use of Force in a Correctional Institution," that appeared in *CorrectionsOne News*, February 4, 2008.

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INTERVENTION OPTIONS

The second phase of Disturbance Resolution is Intervention Options. These are the trained POSC techniques. Much of your POSC training is devoted to learning these. The intervention options are divided into five modes as shown:

INTERVENTION OPTIONS

MODE	PURPOSE
Presence	To present a visible display of authority
Dialogue	To verbally persuade
Control Alternatives	To overcome passive resistance, active resistance, or their threats
Protective Alternatives	To overcome continued resistance, assaultive behavior, or their threats
Deadly Force	To stop the threat

These five modes are the main force option categories. Each mode includes specific tactics and techniques that you will learn. If your initial approach to a disturbance emergency situation in your jail or detention facility leads you to decide to intervene, Intervention Options provides you with a range of possible responses. Each of the five modes listed reflects the need for an increasing level of control.

Remember that POSC is defined as a *system of verbalization skills coupled with physical alternatives.* This means that if possible, it is always preferable to accomplish the objective of control through the first two modes—*Presence* and *Dialogue*—which do not involve application of physical force. Using these modes is always desirable, because it significantly lessens the chances of anyone getting hurt, minimizes

stress for everyone, and also minimizes the risk of litigation. The part of the POSC definition that says "coupled with physical alternatives" implies that you will use physical force when verbalization skills have either not worked or would clearly be ineffective.

However, you do not have to start with the lowest level of control—*Presence*—and try that first, and then if that does not work escalate to the next level—*Dialogue*—and then if that does not work escalate to a *Control Alternative*, and so on. You can move from one mode to another as you deem appropriate, based upon your tactical evaluation. You are authorized to use the level and amount of force that is reasonably necessary to control a subject. Depending on the circumstances, it may be appropriate to escalate quickly through the modes or to skip modes, based upon your tactical evaluation.

To illustrate this concept, suppose that a large inmate suddenly assaults you. You have no chance to try to control the situation with dialogue or to use escort holds or to decentralize the inmate. Instead, you would probably block the assault and then use a forearm strike and perhaps a knee strike, and take the inmate to the ground.

To understand this more clearly, remember the basic concepts which were discussed earlier, under The Control Theory:

- Officers must maintain a position of advantage.
- Proper police action balances safety and efficiency.
- An officer is always permitted to disengage and/or escalate in order to take proper police action.

- Once control has been established, you must reduce force to a level sufficient to maintain control.
- Control is a perception based on an officer's training and experience and the fact situation.

Each of the five modes under Intervention Options serves a different purpose. Following is a discussion of each of the modes and its purpose, along with a brief description of the tactics and techniques within each mode. The specific steps of each of the POSC techniques are found in Appendix D.

PRESENCE

The first mode, *Presence*, reflects the fact that sometimes all that is needed to control a situation is the presence of one or more officers. The purpose of this mode is: *to present a visible display of authority*.

If inmates see an officer (or more than one), that alone may persuade them to comply—either because they respect authority or because they do not want to suffer the consequences of escalated force beyond officer presence. Presence often conveys an implied threat of escalation of force if compliance is not forthcoming.

A specific form of officer presence involving a clear threat of escalation of force is often referred to as a "show of force." This usually involves several officers gathered together at the site of a disturbance emergency, sometimes with equipment to control the situation. For example, if an inmate refuses an order to exit his or her cell, an option is for multiple officers to stage outside of the cell. The inmate knows that he or she cannot win in the face of such odds, and voluntarily exits the cell. The "show of force" has been

successful because the situation is resolved—control has been achieved—and no one has been hurt.

For an officer's presence to be effective, it must convey authority and readiness to act. This is referred to as *command presence*. Command presence is conveyed by your *stance*, which refers to the way you stand, your posture, and the position of your hands. Not only does a proper stance convey a message to a subject, but it also puts you in the best position to react properly should the need arise.

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interests and those of your fellow staff members. Your job is to do what you need to do to control people and situations as quickly and efficiently as possible—not to unnecessarily make things worse than they are and cause further problems.

The other side of the coin is that subjects with whom you are dealing (e.g., inmates or visitors or others) can do those same things to you—that is, say things or do things that will provoke you. Just as you must try not to unnecessarily provoke other people, you must also not let others provoke you. You must learn to deal with provocations from others in a professional manner, and not get angry or escalate to a physical confrontation. You need to know your "hot buttons"—those that others can push to try to provoke you, and know how to avoid letting them provoke you. This is not necessarily easy, but it is part of your job as a professional.

CONTROL ALTERNATIVES / PROTECTIVE ALTERNATIVES

Control Alternatives is the third mode in Intervention Options. The purpose of this mode is *to*

overcome passive resistance, active resistance or their threats. Active resistance is behavior that physically counteracts an officer's attempt to control, and which creates risk of bodily harm[17] to the officer, subject, or other person.

Protective Alternatives is the fourth mode in Intervention Options. The purpose of this mode is to *overcome continued resistance, assaultive behavior, or their threats*.

Several tactics may fit either into Control Alternatives or Protective Alternatives, depending on the situation. Which mode any of these tactics fits into depends on the totality of the circumstances in a given use-of-force situation. A particular tactic may qualify as a Control Alternative in one situation because of the purpose for which it is used. But that same tactic may, in a different use-of-force situation, more properly qualify as a Protective Alternative because of why it is being used in that situation. Here are a few examples to illustrate this point:

- A focused strike is a type of what are called *Active Countermeasures*. Active Countermeasures are generally classified as Protective Alternatives. However, an officer may use a focused strike (such as a knee strike to the back of the leg), to "distract" a passively-resisting inmate who is locking up his or her arm to try to prevent the officer from establishing a wrist lock. Use of this focused strike in that situation would be a Control Alternative because it is being used to "overcome passive resistance. . ." If the officer

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[17] "Bodily harm" is defined in Wisconsin statutes (§ 939.22[4] as " . physical pain or injury, illness, or any impairment of physical condition."

can get the inmate to stop resisting, he or she can establish the wrist lock and gain control.

- Use of a baton is generally classified as a Protective Alternative. However, in a crowd-control situation, an officer may use a baton to direct an inmate into a specific area. Use of the baton in this way would be considered a Control Alternative because the purpose of using it is to "overcome... passive or active resistance. . ." By using the baton in that way, the officer is attempting to gain control quickly so as to avoid having to escalate to using the baton to strike the inmate. Use of a baton as an impact weapon would be a Protective Alternative because it would meet the stated purpose for that mode.

Nevertheless, certain tactics are usually best classified as Control Alternatives because they generally fall under the stated purpose for Control Alternatives, while others are usually best classified as a Protective Alternative because they generally fall under the stated purpose for Protective Alternatives.

The following tactics are usually categorized as Control Alternatives:

- escort holds
- compliance holds
- OC aerosol spray
- electronic control devices (ECD's)
- passive countermeasures

The following tactics are usually categorized as Protective Alternatives:

- active countermeasures

- incapacitating techniques
- intermediate weapons

The next section discusses each of these tactics. Specific instructions for applying the techniques are found in Appendix E.

Escort Holds

The purpose of escort holds is to *safely initiate physical contact*. If a subject does not comply with your verbal directions, you can use an escort hold to gain control of him or her, preventing a physical confrontation. An escort hold also enables you to move the subject in a controlled way.

Compliance Holds

The purpose of compliance holds is *to overcome passive resistance*. Passive resistance means that the subject physically resists your efforts to move him or her—but not by actively fighting with you. You might, for example, move directly to a compliance hold if you have tried to use an escort hold on an inmate and he or she physically resists that attempt.

Oleoresin Capsicum (OC) Aerosol Spray

Oleoresin capsicum is an inflammatory agent that is a mixture of an oily resin and a naturally occurring essential oil derived from varieties of the red pepper plant. It is generally prepared in aerosol form, in various concentrations. It works by creating in a subject a variety of physical effects that may result in confusion and disorientation, thus disrupting the subject's ability to continue to resist. OC affects people in various ways, including these effects:

- pain and tearing in the eyes, causing involuntary closing or rapid blinking

- reddening of affected skin (usually the face), combined with a feeling of intense heat
- inflammation of the mucous membranes of the nose, eyes ,mouth and throat
- if inhaled, coughing, gagging, and gasping for breath

Because of the effects on the eyes and breathing, subjects may panic, fearing that they are being blinded and/or suffocated. Typically, the hands will go to the face, the upper body will bend forward, and the person may go to his/her knees for increased stability. Other subjects may run.

Although the effects can be very intense, they generally subside within 30-45 minutes. The effects also vary with different people. Some people are incapacitated, others affected very little.

Additionally, some people, including those who are impaired by alcohol or drugs, mentally ill, emotionally disturbed, or highly motivated, may not be affected much or at all. Even those who experience the physical effects may have the mental toughness to fight through them. If your use of OC is not effective in assisting you to gain control, you must be ready to disengage and/or escalate.

Whether or not OC spray is used in a particular jail or detention center, it is highly likely that jail or detention officers will receive subjects who have been sprayed during an arrest and brought to jail for custody. Such subjects may be experiencing the after-effects of use of OC spray, requiring that you apply appropriate after-care procedures. These procedures are specified in the section of this text called Follow-Through Considerations. See also Appendix E.

Electronic Control Devices (ECDs)

Electronic Control Devices (ECDs) include stunning devices, such as the Taser® brand and stun shields. These and similar devices are used in a number of jails and detention facilities.

One of the benefits of ECDs (as well as OC spray), is that they are often effective at deterring inmates from further inappropriate behavior or failure to comply. Inmates will often comply when they see that an officer has OC or an ECD available and is ready to use the device, because they do not want to be subjected toward the painful experience of having the device used on them. In this way, control devices can often be used as a "show of force" thereby minimizing need for actual application of force.

Passive Countermeasures

The purpose of passive countermeasures is: to *decentralize* a subject. The term "decentralize" means to direct a subject to the ground.

It is appropriate to use passive countermeasures if you reasonably believe that you will be unable to achieve control with the subject standing. For example, if a subject continues to violently resist even while you apply a come-along hold, Preventing you from achieving control and applying handcuffs, you may decide that it is appropriate to decentralize the subject to achieve control. Once a subject has been decentralized, you must take appropriate action to stabilize and handcuff the subject, disengage, or escalate.

Decentralizations may be needed in a variety of situations and from a variety of positions.

The POSC training you receive includes four techniques for decentralizing a subject:

1. Secure-the-head decentralization
2. Hug-yourself decentralization
3. Lower-your-center decentralization
4. Pull-in / push-down decentralization

Any decentralization tactic used must allow you to follow two critical guidelines to minimize the chance of injury to the subject:

- Protect the subject's head and neck as much as possible
- Control the speed of the subject's descent.

Decentralizations that do not follow these guidelines might be considered excessive force.

Active Countermeasures

Active countermeasures are unarmed blocking and striking techniques. Their purpose is *to create dysfunction* in an actively resistive or assaultive subject, by causing fluid shock waves that temporarily disrupt a subject's ability to resist. The goal is to interrupt the subject's resistance, enabling an officer to direct the subject to the ground for stabilization, handcuffing, and other follow-through procedures.

Active countermeasures include

- Basic blocks
- Vertical stun
- Focused strikes

Basic blocks help protect you from incoming strikes. Effective blocking of hand or leg strikes permits you to disengage temporarily or escalate to an appropriate

intervention option. You must be able to block strikes from various heights.

Vertical stuns are useful in close quarters confrontations when you are grappling with a subject and have a suitable flat, sturdy, vertical surface, such as a wall, nearby. When you use a stun, you attempt to create temporary dysfunction of the subject's respiratory system and/or mental processes by forcefully directing the subject's torso into the wall or other vertical surface. The disruption to the subject is short-term—five to seven seconds—during which you can take other appropriate action, such as disengaging, decentralizing the subject for ground stabilization, or escalating to a higher level of control, as needed.

Focused strikes are intended to create dysfunction and disrupt the subject's ability to continue resistive or assaultive behavior. Unlike stuns, however, the impact is not spread throughout the subject's body, but is instead focused on a particular target area of the subject's body. (See APPENDIX F for these target areas.)

Good use of body mechanics will enhance the effectiveness of active countermeasures. When you use active countermeasures, you should use your whole body to your advantage. Here are some basic principles:

- Stay balanced. If you over-extend your stance or reach for your target, your strike will lose energy.
- Move into strikes when possible, taking care to re-adjust your stance as needed, and maintain balance throughout the confrontation.

- Rotate your hips in the direction of the strike to add power, being sure that your front foot is oriented to allow full rotation.

Incapacitating Techniques

The purpose of incapacitating techniques is *to cause the immediate, temporary cessation of violent behavior.*

The only technique within this tactic is the *diffused strike*. This is a non-focused strike delivered from a trained distance applied to create fluid shock waves to the base of the subject's neck, an area that is the origin of the brachial plexus of nerves. The diffused strike may be applied from the front or rear. Like the vertical stun, the diffused strike disrupts nerve impulses to the brain. Unlike the vertical stun, however, the effect is usually greater, rendering the subject temporarily unconscious.

Remember that once a situation has been stabilized after the use of force, initial medical assessment must be initiated, as set forth and trained in The First Responder Philosophy.

Intermediate Weapons

The purpose for using intermediate weapons is to *impede a subject*, preventing him or her from continuing resistive, assaultive, or otherwise dangerous behavior.

Intermediate weapons include a variety of impact and other weapons designed to impede subjects. Within the DAAT system, the only trained tactic within intermediate weapons is use of batons. Use of batons, however, is not a trained tactic In the POSC system. Thus, jail and detention officers are not trained in the use of any specific intermediate weapon in basic training. Some jails and detention centers,

however, do include training in use of the straight baton in their in-service or specialized training programs.

DEADLY FORCE

Deadly force is the fifth mode under Intervention Options. The purpose of deadly force is *to stop the threat.*

To understand the appropriate application of this force mode, you must know both the *definition* of deadly force and the *justification* for use of deadly force, under both the DAAT and POSC systems.

The definition of deadly force is:

> *"The intentional use of a firearm or other instrument, the use of which would result in a high probability of death."*

The justification for use of deadly force is as follows:

> *"Behavior which justifies your use of deadly force is that which has caused or imminently threatens to cause death or great bodily harm to you or another person."*

The definition of deadly force and justification for such force are important because they are related to the purpose for the deadly force mode. Remember that the purpose is *to stop the threat*—not to kill a person. Even though death may well be the result of the application of deadly force, death is not the intent. The intent is to *stop* a subject who is displaying behavior "which has caused or imminently threatens to cause death or great bodily harm to you or another person." In other words, you must stop the subject right now in order to prevent death or great bodily harm to you or another person, and your tactical evaluation indicates that deadly force is justified. But it is *stopping*, not

killing, that is the intent. That is an important distinction.

Within the DAAT system, there is only one trained tactic within the mode of deadly force, the use of firearms. However, use of firearms is not trained in the POSC system. Thus, jail and detention officers are not trained in application of any deadly force tactics. If firearms are used in a jail, it would generally be in the context of a response by a trained specialized team.

This does not mean that you cannot use deadly force in a jail or detention facility. If the justification exists, you can use deadly force. But you will not be doing so on the basis of tactics learned in POSC. Instead, your use of such force would fall into the category of legally justifiable use of force that is *not trained but is justified under the*

* * *

[Filed: 10/18/12]

II. POST-TRIAL INSTRUCTIONS

Introduction

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow *all* of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of 4 questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

Note that certain questions in the verdict are to be answered only if you answer a preceding question in a certain manner. Read the introductory portion of each

question very carefully before you undertake to answer it. Do not answer questions needlessly.

Burden of Proof

When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. On the liability questions in the special verdict, the burden of proof is on the party contending that the answer to a question should be "yes." You should base your decision on all of the evidence, regardless which party presented it.

Answers Not Based on Guesswork

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party having the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible evidence from which you can find the existence of the facts that the party must prove in order to satisfy the burden of proof on the question under consideration. In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless who introduced it.

Number of Witnesses

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a large number. You need not accept the testimony of the larger number of witnesses.

All Persons Equal Before the Law

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

Conviction of Crime

You have heard evidence that plaintiff Michael Kingsley has been convicted of a felony. You may use that evidence to help you decide whether plaintiff's testimony is truthful and how much weight to give his testimony. You may not consider this evidence for any other purpose.

Multiple Defendants

You must give separate consideration to each claim and each party in this case. Although there are two defendants, it does not follow that if one is liable, the other is also liable. In considering a claim against a defendant, you must not consider evidence admitted only against other defendants.

Special Verdict Questions

Plaintiff alleges that defendants used excessive force against him.

Question No. 1 asks whether on May 21, 2010, one or both defendants used excessive force against plaintiff.

Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:

(1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused some harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.

A person can be harmed even if he did not suffer a severe injury.

You have heard evidence about whether the defendants' conduct complied with or violated their training and Monroe County Sheriff's Department policies. You may consider this evidence in your deliberations. But remember that the issue is whether the defendants used excessive force on plaintiff, not whether defendants complied with or violated their training or the Monroe County Sheriff's Department policies.

If you find that plaintiff has proved each element of his excessive force claim by a preponderance of the evidence with respect to one or both defendants, you should answer "Yes" in the appropriate space in Question No. 1. Then proceed to Question No. 2.

If, on the other hand, you find that plaintiff has failed to prove any element of his excessive force claim by a preponderance of the evidence with respect to one or both defendants, you should answer "No" in the appropriate space in Question No. 1. If you answer "No" as to both defendants in Question No. 1, you should not consider any more questions.

Damages Questions

Questions Numbers 2, 3 and 4 involve the issue of damages. If you answer "Yes" to Question No. 1 for one or both defendants, then you must answer Question No. 2 and Question No. 3 for those defendants.

Compensatory damages

Question No. 2 asks what amount of money, if any, will fully and fairly compensate plaintiff for the harm caused by defendants. These are called "compensatory damages."

Plaintiff has the burden of convincing you, by the preponderance of the evidence, both that he has been

injured or damaged and the amount of the damages. This does not mean, however, that plaintiff must produce evidence that is as exact as the evidence needed to support findings on other questions in the verdict. Determining damages involves the consideration of many different factors that cannot be measured precisely. In determining the damages you must base your answer on evidence that reasonably supports your determination of damages under all of the circumstances of the case.

Compensatory damages are not restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if these are not easy to measure. You should consider the physical, mental and emotional pain and suffering that plaintiff has experienced.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine the amount of the damages sustained from the evidence you have seen and heard. Examine that evidence carefully and impartially. Do not add to the damage award or subtract anything from it because of sympathy to one side or because of hostility to one side. Do not make any deductions because of a doubt in your minds about the liability of any of the parties.

If you find in favor of plaintiff on Question No. 1 but find that he has failed to prove that he has suffered any compensatory damages, you should enter $1.00 in nominal damages for plaintiff in Question No. 2.

Punitive Damages

Question No. 3 **asks whether one or both defendants acted in a way that demonstrated a willful or reckless disregard for plaintiff's rights. If you answered "yes" to Question No. 3 with respect to one or both defendants, you may award punitive damages in *Question No. 4* against those defendants.**

Punitive damages are never a matter of right. This means that you are not required to make any award of punitive damages, but you may do so if you think it is proper under the circumstances. It is in the jury's discretion to award or withhold them.

Punitive damages may be awarded even if the violation of plaintiff's rights resulted in only nominal compensatory damages. That is, you may award punitive damages even if the plaintiff can show no damages or other injury as a result of defendants' actions.

The purposes of punitive damages are to punish the defendants for their conduct and to serve as an example or warning to the defendants and others not to engage in similar conduct in the future. Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against defendants.

You may assess punitive damages only if you find that the conduct of at least one of the defendants was in reckless disregard of plaintiff's rights. An action is in reckless disregard of plaintiff's rights if under the circumstances, it reflects complete indifference to plaintiff's safety or rights. If you find that a defendant's conduct was motivated by evil motive or intent, such as ill will or spite or grudge either toward plaintiff individually or toward all

persons such as plaintiff, then you may find that the defendant deliberately violated the plaintiff's rights. In addition, if the defendant was in a position in which he certainly should have known that his conduct would violate the plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to the plaintiff, then that defendant acted with reckless disregard for the plaintiff's rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of defendants' conduct;
- the impact of defendants' conduct on plaintiff;
- the relationship between the plaintiff and defendants;
- the likelihood that defendants would repeat the conduct if an award of punitive damages is not made; and
- the relationship of any award of punitive damages to the amount of actual harm the plaintiff suffered.

Selection of Presiding Juror; Communication with the Judge; Verdict

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror.

This person will help to guide your discussions in the jury room.

You are free to deliberate in any way you decide or select whomever you like as a presiding juror. When thinking about who should be presiding juror, you may want to consider the role that the presiding juror usually plays. He or she serves as the chairperson during the deliberations and has the responsibility of insuring that all jurors who desire to speak have a chance to do so before any vote. The presiding juror should guide the discussion and encourage all jurors to participate. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors. Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.

Once you are in the jury room, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree.

When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return with the verdict into the courtroom.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 10/18/12]

10-cv-832-bbc

MICHAEL B. KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

SPECIAL VERDICT

We, the jury, for our special verdict, find as follows:

Question No. 1: On May 21, 2010, did one or both of the defendants use excessive force against plaintiff Michael Kingsley?

Stan Hendrickson: NO
("Yes" or "No")

Fritz Degner: NO
("Yes" or "No")

If you answered "No" to Question No. 1 for both defendants, do not answer any more questions.

If you answered "Yes" to Question No. 1 for either defendant, answer Question No. 2.

Question No. 2: What amount of money, if any, will fully and fairly compensate plaintiff Michael Kingsley for the harm caused by defendants?

$_____

No matter how you answered Question No. 2, answer Question No. 3 as to each defendant for whom you answered "Yes" in Question No. 1.

Question No. 3: Did one or both of the defendants act in a way that demonstrated a willful or reckless disregard for plaintiff's rights?

Stan Hendrickson: _____

("Yes" or "No")

Fritz Degner: _____

("Yes" or "No")

If you answered "No" to Question No. 3 for both defendants, do not answer any more questions.

If you answered "Yes" to Question No. 3 for either defendant, answer Question No. 4 as to each defendant for whom you answered "Yes" in Question No. 3.

Question No. 4: What amount of money, if any, do you award as punitive damage's?

Stan Hendrickson: _____

("Yes" or "No")

Fritz Degner: _____

("Yes" or "No")

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/s/ Mark Rowley
Presiding Juror

Madison, Wisconsin

Date: 10-17-12

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 10/23/12]

10-cv-832-bbc

MICHAEL B. KINGSLEY,

Plaintiff,

v.

DENNIS PEDERSEN, LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER AND KARL BLANTON,

Defendants.

JUDGMENT IN A CIVIL CASE

This action came before the court and a jury with District Judge Barbara B. Crabb presiding. The issues have been considered, tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants and this case is dismissed.

Approved as to form this 18th day of October, 2012.

/s/ Barbara B. Crabb
Barbara B. Crabb,
District Judge

/s/ Peter Oppeneer
Peter Oppeneer, Clerk of Court

10/23/12
Date

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-3639

MICHAEL B. KINGSLEY,

Plaintiff-Appellant,

v.

STAN HENDRICKSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 3:10-cv-00832-bbc
Barbara B. Crabb, Judge.

ARGUED APRIL 23, 2013
DECIDED MARCH 3, 2014

Before RIPPLE and HAMILTON, *Circuit Judges*, and STADTMUELLER, *District Judge*.*

RIPPLE, *Circuit Judge*. Michael Kingsley brought this action under 42 U.S.C. § 1983 against six staff members of a Wisconsin county jail, where he had been held as a pretrial detainee in 2010. Mr. Kingsley

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* The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

alleged that during his forcible transfer to a new cell, which included the application of a taser, the defendants had violated various of his constitutional and statutory rights. The district court granted partial summary judgment for the defendants; a single claim of excessive force against Sgt. Stan Hendrickson and Deputy Fritz Degner proceeded to trial. The jury returned a verdict for the defendants.

Mr. Kingsley now appeals the judgment entered on the verdict, contending that the jury received erroneous and confusing instructions. Specifically, Mr. Kingsley contends that the district court conflated the standards for excessive force under the Eighth and Fourteenth Amendments and, as a result, wrongly instructed the jury to consider the subjective intent of the defendants. Mr. Kingsley also contends that the instructions misstated the harm that he must prove to obtain relief. We hold that the instructions were not an erroneous or confusing statement of the law of this circuit and that Mr. Kingsley affirmatively acquiesced to the instruction dealing with harm. Accordingly, we affirm the judgment of the district court.

I

BACKGROUND

A.

In April 2010, Mr. Kingsley was booked into the Monroe County Jail in Sparta, Wisconsin, as a pretrial detainee. On May 1, he was transferred to the facility's south cell block.

On May 20, 2010, a deputy performing a cell check noticed a sheet of yellow legal paper covering the light above Mr. Kingsley's bed and ordered him to take it down. Mr. Kingsley refused the order and answered

that he had not put the paper there.[1] The deputy moved on. When he returned for a further cell check later in the evening, he noticed that the paper had not been removed and again ordered Mr. Kingsley to take it down. After another refusal and a warning of possible disciplinary action, the deputy issued him a minor violation and reported it to Sgt. Hendrickson. Sgt. Hendrickson informed Deputy Karl Blanton that Mr. Kingsley would have to remove the paper in the morning.

When Deputy Blanton made his morning rounds, he ordered Mr. Kingsley to take down the paper. Mr. Kingsley did not respond and did not remove the paper. A few minutes later, Sgt. Hendrickson came to deliver Mr. Kingsley's medication, and he again ordered Mr. Kingsley to take down the paper. After several requests, Mr. Kingsley again refused, stating once again that he had not put the paper there. Sgt. Hendrickson next called the jail administrator, Lieutenant Robert Conroy.

Lt. Conroy then went to Mr. Kingsley's cell. After Mr. Kingsley refused his order, Lt. Conroy said jail staff would take the paper down and would have to transfer Mr. Kingsley to another cell in the interim. He also threatened discipline.

A few minutes later, Sgt. Hendrickson, Deputy Blanton, Lt. Conroy, Deputy Fritz Degner and Deputy Sheriff Shisler arrived at the cell. They ordered Mr. Kingsley to stand up and to back up to the door with his hands behind his back. Mr. Kingsley asked why and protested that he had done nothing wrong. Deputy

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[1] Apparently, covering the lights with paper is a common practice by inmates in an effort to dim some of the brightness of the jail's lights.

Degner told Mr. Kingsley to follow the order or he would be tasered. He was again ordered to get up, but he continued to lie facedown on his bunk. He did, however, put his hands behind his back.

At this point, Sgt. Hendrickson and Deputy Blanton entered the cell, and, with some difficulty (which they attribute to Mr. Kingsley "tensing" his arms and holding them apart),[2] they were able to handcuff him. Mr. Kingsley would not follow an order to stand, so they pulled him to his feet. Mr. Kingsley then fell to his knees; he claimed that, in pulling him off of the bed, the officers had smacked his feet on the bedframe, causing him pain. He claimed that the pain was so severe that he could not stand or walk. The officer therefore carried him out of the cell by holding him under his arms and placed him facedown in the hallway. When he would not answer questions about his foot injury, he was taken in the same manner to a receiving cell and placed facedown on the bunk.

Once he was on the receiving-cell bunk, the officers attempted to remove the handcuffs. The evidence at trial was conflicting on the later course of events.[3] The defendants say that Mr. Kingsley resisted their effort, pulling the handcuffs apart and trying to get up. Mr. Kingsley denied this resistance at trial. At some point, Sgt. Hendrickson put his knee in Mr. Kingsley's back, and Mr. Kingsley told him, in colorful language, to get

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[2] R.27 at 7.

[3] The record contains several videos, including one of the transfer and one of the incident in the receiving cell. However, the district court found them of limited value on the disputed points because the camera angle is such that Mr. Kingsley is nearly entirely blocked by the defendants.

off him. Mr. Kingsley claims that the defendants then smashed his head into the concrete bunk, an allegation the defendants deny.

After some further verbal exchange,[4] Deputy Degner applied a taser for five seconds on Mr. Kingsley's back. Lt. Conroy then ordered all of the staff to clear the cell. Fifteen minutes later, the staff returned and were able to remove the handcuffs. Mr. Kingsley was placed on a medical watch, but refused the attention of a nurse.[5]

B.

In December 2010, Mr. Kingsley, proceeding pro se, brought this action in the district court. His principal theory was that the defendants had violated his due process rights under the Fourteenth Amendment.[6] His initial complaint presented several claims against seven Monroe County defendants, including an excessive force claim relating only to Sgt. Hendrickson and Deputy Degner.

The parties cross-moved for summary judgment. The district court granted partial judgment for the defendants on a procedural due process claim relating

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[4] Mr. Kingsley claims Sgt. Hendrickson ordered Deputy Degner to "[t]ase his ass." R.157 at 52. The defendants deny that these words were used but agree that Sgt. Hendrickson told Deputy Degner to apply the taser in contact stun mode to Mr. Kingsley.

[5] Following the incident, Mr. Kingsley was given a major violation report showing four rule violations. The events surrounding the issuance of that report and the consequences were a part of Mr. Kingsley's procedural due process claim, which is not at issue in this appeal.

[6] He brought the federal claims under 42 U.S.C. § 1983. A state law claim for assault and battery initially was presented as well. That claim is not at issue in this appeal.

to Mr. Kingsley's discipline by jail staff. It concluded, however, that material issues of fact remained that precluded judgment on the excessive force claim based on the officers' conduct in the receiving cell. Specifically, the court identified "a dispute about whether defendants slammed plaintiff's head into the concrete bed and used a taser against him solely for the purpose of causing him harm."[7] Although the officers clearly had difficulty removing the handcuffs, Mr. Kingsley claims that it was because they had been applied too tightly and Sgt. Hendrickson's kneeling on his back had caused his body to tense; the officers claim that Mr. Kingsley was resisting. The court observed that, from the video, "it is not clear . . . whether plaintiff was resisting or struggling. [He] does not appear to be moving his body around aggressively or very much at all."[8]

The court noted the case law that held that it was reasonable to use force against an inmate who refused to comply with orders but concluded that the issue in the case was "whether [the] defendants' response to plaintiff's obstinance was *reasonable under the circumstances* or whether it was excessive and was intended to cause [the] plaintiff harm."[9] The court also concluded that, because a jury could find that the defendants had acted with malice, qualified immunity was not available. Although the court, in its ruling, concluded that the relevant constitutional right was contained within the Fourteenth Amendment because of Mr. Kingsley's status as a pretrial detainee, the

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[7] R.69 at 12.

[8] *Id.* at 7.

[9] *Id.* at 14 (emphasis added).

court applied Eighth Amendment excessive force standards in assessing the claim.

Following the grant of summary judgment, the parties stipulated to the dismissal with prejudice of all outstanding claims except the excessive force claim against Sgt. Hendrickson and Deputy Degner. Counsel was appointed for Mr. Kingsley and the case proceeded to trial. In pretrial proceedings, the district court proposed an instruction on excessive force to which both parties objected, and the court made various modifications. At the close of the evidence, the parties revisited the instruction and again objected to its content. Again, the district court made some modification and added a clarifying instruction. The court finally settled on the following instruction:

> Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;
>
> (2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;
>
> (3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and
>
> (4) Defendants' conduct caused some harm to plaintiff.

> In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.
>
> Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:
>
> • The need to use force;
>
> • The relationship between the need to use force and the amount of force used;
>
> • The extent of plaintiff's injury;
>
> • Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
>
> • Any efforts made by defendants to limit the amount of force used.[10]

Mr. Kingsley's counsel objected to the inclusion of "harm" as an element of an excessive force claim. He contended that the jury might confuse the element of harm for some sort of lasting or significant injury. Counsel first requested a clarifying instruction that "pain is considered harm."[11] When the court began to offer a preferred alternative, "[A] person can be harmed even if he does not suffer a lasting injury or . . .," plaintiff's counsel interjected, "Or severe

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[10] R.146 at 3-4.

[11] R.156 at 79.

injury."[12] Following this exchange, the jury was instructed that "[a] person can be harmed even if he did not suffer a severe injury."[13]

The jury returned a verdict for the defendants, and the district court entered judgment dismissing the case. Mr. Kingsley timely appeals the judgment. He submits that the instruction misstated the law and confused the jury on the subjects of both the intent and harm necessary to establish an excessive force claim in the pretrial detainee context.

II

DISCUSSION

On appeal, Mr. Kingsley raises two challenges to the jury instructions. First, he claims that the instruction wrongfully conflated the standard for excessive force claims under the Eighth and Fourteenth Amendments and that, as a result, the instructions incorrectly required him to demonstrate that the defendants acted with reckless disregard for his safety. Second, Mr. Kingsley claims that the instruction regarding harm, which stated that harm was an element of the claim and that it could be demonstrated without a showing of "severe injury," was both incorrect and confusing.

We shall assess each of his objections to the instructions in turn. Our review of jury instructions is de novo. *Huff v. Sheahan*, 493 F.3d 893, 899 (7th Cir. 2007). We must "determine whether, taken as a whole, [the instructions] correctly and completely informed the jury of the applicable law." *Id.* "We defer to the district court's phrasing of an instruction that

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[12] *Id.* (internal quotation marks omitted).

[13] R.146 at 4.

accurately states the law; however, we shall reverse when the instructions misstate the law or fail to convey the relevant legal principles in full and when those shortcomings confuse or mislead the jury and prejudice the objecting litigant." *Id.* (citation omitted) (internal quotation marks omitted).

A.

1.

A claim of excessive force, like the one at issue here, is, at bottom, one that seeks to impose liability for "physically abusive governmental conduct." *Graham v. Connor*, 490 U.S. 386, 394 (1989). The right to be free from such abuse derives from various provisions of the Bill of Rights. The Fourth Amendment affords protection to the person in the context of a seizure, *id.*; the Eighth Amendment applies when, following the constitutional guarantees of our criminal process, there has been an adjudication of guilt and an imposition of sentence, *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). Between the status of arrestee and sentenced prisoner is the intermediate status of the detainee, who similarly is entitled to protection from physically abusive government conduct. The constitutional source of that protection lies in the right to be free from deprivations of liberty without due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979).

In sum, we evaluate a claim of excessive force not under "some generalized 'excessive force' standard," but "by reference to the specific constitutional standard which governs that right." *Graham*, 490 U.S. at 394. Mr. Kingsley was a pretrial detainee at the time of the tasing incident; therefore, the Fourteenth Amendment's Due Process Clause is the source of his

substantive right and determines the applicable standards to evaluate his claim. *See Ingraham*, 430 U.S. at 672 n.40; *Forrest v. Prine*, 620 F.3d 739, 743-44 (7th Cir. 2010).

2.

In examining the contours of the right to be free from excessive force *as an element of due process, Bell v. Wolfish*, 441 U.S. 520 (1979), is our primary touchstone. There, the Supreme Court evaluated a claim regarding the conditions of confinement for pretrial detainees. "[U]nder the Due Process Clause, a detainee *may not be punished* prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535 (emphasis added). As a consequence, "the proper inquiry" is whether the treatment of the detainee "amount[s] to punishment." *Id.* The Supreme Court markedly contrasted due process protections for detainees against the rights of sentenced inmates: "A sentenced inmate[] . . . *may be punished*, although that punishment may not be 'cruel and unusual' under the Eighth Amendment." *Id.* at 535 n.16 (emphasis added).

Our cases also have noted that the protection afforded by the Due Process Clause is broader than that afforded under the Eighth Amendment. *See Lewis v. Downey*, 581 F.3d 467, 474 (7th Cir. 2009) ("[T]he Due Process Clause, which prohibits all 'punishment,' affords broader protection than the Eighth Amendment's protection against only punishment that is 'cruel and unusual.'"); *id.* at 475 (noting that, in the excessive force context, "anything that would violate the Eighth Amendment would also violate the Fourteenth Amendment"); *cf. Forrest*, 620 F.3d at 743-44 (acknowledging that "[t]he Fourteenth Amendment right to due process provides at least as much, and

probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment"). Of course, "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Bell*, 441 U.S. at 537.[14] We must ask whether a particular action was taken "for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538.[15]

Notably, the Due Process Clause provides its own limiting principle; the Clause protects against only abusive conduct that is more than negligence, *Daniels v. Williams*, 474 U.S. 327, 334 (1986), or even gross negligence, *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc). Indeed, we have said that the official conduct must be at least reckless. *See Archie*, 847 F.2d at 1219-20. Recklessness, which necessarily incorporates some measure of subjective intent, stands in contrast to the rule under the Fourth Amendment that focuses only on whether the government conduct was "*objectively* reasonable" in light of all of the facts and circumstances. *Graham*, 490 U.S. at 397 (emphasis added) (internal quotation

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[14] As we already have noted, *Bell v. Wolfish*, 441 U.S. 520 (1979), was a conditions of confinement case, not a case concerning excessive force, and the Supreme Court has not applied its rule directly in the excessive force context. However, in *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989), the Court noted that *Bell* made clear the right of a detainee to be free from excessive force under the Due Process Clause.

[15] The Supreme Court has noted, at least in the context of the Eighth Amendment, that "punishment" itself requires "'a deliberate act intended to chastise or deter.'" *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

marks omitted); *see also Common v. City of Chicago*, 661 F.3d 940, 943 (7th Cir. 2011).

While these cases make clear the basic theoretical and doctrinal distinction among the constitutional standards governing the various categories of confinement, they do not provide a practical framework for distinguishing the obligations of those constrained by each of the constitutional provisions. Indeed, on more than one occasion, while noting the distinction between pretrial and posttrial incarceration, we have decided the case before us by employing the more familiar Eighth Amendment standard. *See, e.g., Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 664 (7th Cir. 2012) ("[C]ourts still look to Eighth Amendment case law in addressing the claims of pretrial detainees, given that the protections of the Fourteenth Amendment's due process clause are at least as broad as those that the Eighth Amendment affords to convicted prisoners, and the Supreme Court has not yet determined just how much additional protection the Fourteenth Amendment gives to pretrial detainees." (citations omitted)); *Forrest*, 620 F.3d at 744 (affirming summary judgment for the defendant officers where the plaintiff detainee had "not explained[] . . . how any protections guaranteed by the Fourteenth Amendment provide him with more protection than he would receive under traditional Eighth Amendment standards"); *Lewis*, 581 F.3d at 474 (reversing summary judgment for officer in Fourteenth Amendment case upon concluding that the plaintiff had raised a genuine issue of fact even when considered under the more stringent standard set by the Eighth Amendment).

Here, we also have no need to delineate, in any comprehensive fashion, the differences between the

rights of pretrial detainees and adjudicated criminals. Our task is less ambitious. We must determine the adequacy of an instruction given to a jury tasked with determining whether excessive force was employed against a pretrial detainee. We simply must determine whether the instruction at issue was sufficiently precise in its description of the due process right of a pretrial detainee to ensure that Mr. Kingsley's case was fairly presented to the jury.

Several of our cases have explored the problem of describing, in the due process context, the right of a detainee to be free from excessive force. In *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), we expressed concern about defining a detainee's due process right to be free from excessive force by use of highly subjective terms such as "grossly disproportionate" or "shocks the conscience." *Id.* at 147 (internal quotation marks omitted). We pointed out that, in the usual course of events, "the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them." *Id.* This emphasis on the objective standard of a reasonable prison officer was written, of course, against the background of the amorphous "shocks the conscience" standard. *See id.* at 147-48. Notably, however, while giving us the objective criteria borrowed from the Fourth Amendment as a more concrete touchstone against which to measure the conduct of government officials, the court in *Titran* also pointedly remarked that, because "the Due Process Clause does not proscribe negligence or even gross negligence, the search for 'punishment' *cannot be wholly objective*." *Id.* at 147 (emphasis added).

Wilson v. Williams, 83 F.3d 870 (7th Cir. 1996), a case that came to us posttrial and that involved the correctness of the jury instructions, afforded us an occasion to focus more directly on the requisite intent for a due process violation based on excessive force. The jury was instructed that the plaintiff must establish that there was a "use of force that was clearly excessive to the need[,] . . . the excessiveness of which was . . . objectively unreasonable in light of the facts and circumstances at the time." *Id.* at 873. The jury was further instructed that the plaintiff must establish that the defendant "acted deliberately or with callous indifference, evidenced by an actual intent to violate plaintiff's constitutional rights or reckless disregard for his rights." *Id.*

In *Wilson*, the plaintiff had objected that the instruction wrongfully excluded the officer's subjective intent from the jury's consideration. We perceived no error in this regard. We stated that, where the issue of intent is contested, "a jury may properly rely on objective factors to arrive at their determination of that intent." *Id.* at 876. Notably, we also reaffirmed the pointed holdings of *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988), and *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1094 (7th Cir. 1986), that a plaintiff must prove that the defendants "acted deliberately or with callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights." *Wilson*, 83 F.3d at 875 (internal quotation marks omitted).

Again in *Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650 (7th Cir. 2012), when we confronted a situation analogous in many relevant respects to the situation before us today (jail guards extricating a detainee from his cell), we wrote:

> Where, as here, force is employed in the course of resolving a disturbance, the pertinent inquiry is whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. Factors relevant to that inquiry include whether jail officials perceived a threat to their safety and the safety of other inmates, whether there was a genuine need for the application of force, whether the force used was commensurate with the need for force, the extent of any injury inflicted, and whatever efforts the officers made to temper the severity of the force they used. *See also Forrest v. Prine*, 620 F.3d 739, 744-45 (7th Cir. 2010); *Lewis v. Downey*, 581 F.3d 467, 475-77 (7th Cir. 2009).

Id. at 668 (additional citations omitted) (internal quotation marks omitted).

Our dissenting colleague believes that our cases have been ambiguous on the question of intent, but we see no serious ambiguity here. Our cases make clear that, although we employ the objective criteria of the Fourth Amendment as a touchstone by which to measure the gravity of the defendant officer's conduct, we also recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny. In determining whether the defendant officer had the requisite state of mind—at least recklessness—the same criteria used to measure the defendant's lack of care are a useful benchmark. This is because, as *Titran* intimated, the gravity of the offense and the requisite intent are closely linked. *Titran* is clear that the strength of this link under a particular set of facts may mean that the inference of intent is so strong that no further inquiry need be made. *See Titran*, 893 F.2d

at 148 ("If the officers intentionally restrained, jolted, and roughed up Titran without physical provocation from her, their behavior was unreasonable."). But when the inference is less strong, the cases do make clear that some examination of intent is appropriate, and that the distinction makes a mechanical application of Fourth Amendment objective standards impossible. *See id.* at 147 ("Subtle differences between Fourth and [Fourteenth] Amendment standards *are inevitable on account of this mental element.*" (emphasis added)).[16]

We think at this point it is useful to pause and be certain that we have not lost sight of the basic point of *Bell*. *Bell* teaches that the central inquiry relevant in a Fourteenth Amendment case brought by a pretrial detainee is whether the state *punished* him—as opposed to whether it had merely held him, restricted him, or applied a measure of force in a manner consistent with and expected of constitutional restraints on liberty prior to trial. *Bell* was, of course, a conditions of confinement case, *see supra* n.14, but it notes the necessity of determining from the facts whether there is an *intent* to punish.

Finally, we note that although *some* consideration of intent is embraced by our cases, it is limited in significant measure by the fact that it is discernable

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[16] The dissent also suggests that under *Daniels v. Williams*, 474 U.S. 327 (1986), the only "intent" requirement applicable in Fourteenth Amendment cases is the general requirement of intentional rather than negligent acts, necessary to impose liability for *any* alleged constitutional violation. The difficulty with this view is that *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), and other of our cases already have held that there is something unique about the Fourteenth Amendment that imposes a burden not imposed under the Fourth Amendment.

from objective considerations[17]. *See Wilson*, 83 F.3d at 876.

3.

With these principles in mind, we now turn to the jury instruction at issue in the case before us.

On the subject of excessive force, the jury was instructed as follows:

> Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;
>
> (2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;
>
> (3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing

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[17] We acknowledge and are grateful for the fine work of the Committee that developed this circuit's impressive Pattern Civil Jury Instructions. Nevertheless, while those instructions represent learned studies of the law of this circuit, they are persuasive only to the extent that they accurately restate the law of this circuit. *See United States v. Burke*, 781 F.2d 1234, 1239 n.2 (1985) ("Although the pattern instructions are suggestive rather than absolutely binding, a decision of this court is authoritative."). Moreover, it is not clear from the commentary to the Pattern Instruction that the issue we now confront was considered squarely. Notably, there is no mention of the above cases and the contrary language included within them.

to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused some harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.[18]

Mr. Kingsley argues that the instructions were erroneous and confusing because he was required to establish that the officers had acted with "reckless disregard" for his safety, when the instruction should

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[18] R.146 at 3-4

have allowed the jury to find the existence of punishment on the basis of wholly objective factors.

A faithful adherence to the case law that we have discussed precludes our accepting this contention. As we have noted earlier, our cases are clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases. The court's instruction reflected this requirement in our case law. The jury was told specifically that, in determining whether the intent element is satisfied, that is, whether the defendants "acted with reckless disregard of plaintiff's rights," it "may consider" a non-exhaustive list of five factors, drawn almost verbatim from *Wilson*. In short, the instruction required a level of intent at least equivalent to recklessness, measured largely by the objective factors that we already have identified.[19]

The jury was instructed adequately on the elements of Mr. Kingsley's Fourteenth Amendment cause of action.[20]

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[19] The dissent contends that "[t]he clearest thing about *Wilson* is that it reversed the use of the confusing amalgam of an instruction." Dissent at 31. In *Wilson*, this court approved an instruction that tracked very closely the language used in this case, and turned on "whether the prohibited punitive intent was present." *Wilson v. Williams*, 83 F.3d 870, 877 (7th Cir. 1996). It reversed only on another element, completely absent from our present instruction, of a "good faith" defense. *Id.*

[20] The dissent also contends that the instruction was confusing not only because it introduced the extraneous concept of intent, but also because it did so in three separate and quite different ways. *See* dissent at 35-36. We think this overstates the point and overly parses the instruction, which is not our settled approach on review of such matters. True enough, the instruction uses the term "reckless" three times, in three separate phrases. Its first use, that the "force [must have been] applied recklessly" merely

B.

Mr. Kingsley next submits that the district court erred in instructing the jury on the issue of harm. He contends that he should not have been required to demonstrate harm at all and, if harm is an element, that the use of a taser establishes the requisite injury as a matter of law. For this latter proposition, Mr. Kingsley relies on *Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009), in which we held that use of a taser qualified as more than a de minimis application of force. In the alternative, he argues that, even if the harm instruction itself were proper, the jury should not have been further instructed that "[a] person can be harmed even if he did not suffer a severe injury."[21] In his view, this clarifying instruction only confused the matter by "allow[ing] the jury to consider whether the use of the taser on Mr. Kingsley met some threshold standard of injury to qualify as harm."[22] The defendants counter that the plaintiff waived any

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tracks the usage that the dissent essentially admits is legally proper; that is, it says that the force must be applied in a manner displaying more culpability than negligence (i.e., the taser did not go "off by accident," *id.* at 39). The evidence admittedly did not suggest that it had, but no reasonable juror would have been confused as to the meaning under the circumstances. The second usage is less clear, but the surrounding context cures any confusion. Although the jury is asked to determine if the defendants "recklessly disregarded plaintiff's safety" —a less than ideal phraseology it is then told precisely *how* to determine it, by whether they had "failed to take reasonable measures to minimize harm to the plaintiff." The final usage is part of the phrase which introduces the uncontroversial objective considerations.

[21] R.146 at 4.

[22] Appellant's Br. 20

objection and that, in any event, the instruction as given was not erroneous.

1.

We begin with the question of waiver. At trial, Mr. Kingsley did object to the inclusion of harm as an element of the excessive force claim. Our reading of the transcript makes clear, however, that his objection was that, because the defendants repeatedly had contended that there had been no *lasting* injury, the inclusion of the element of harm might be misread as requiring *more* than de minimis harm. Counsel for Mr. Kingsley therefore requested a clarifying instruction that "pain is considered harm."[23] The court simply stated, "I think I'll add 'a person can be harmed even if he does not suffer a lasting injury or . . . ."[24] At this point, plaintiff's counsel interjected, "Or severe injury."[25]

Although Mr. Kingsley objected to the inclusion of "harm" as an element, counsel described the objection as concern that the inclusion of "harm" might be construed erroneously by the jury to require some lasting injury. Notably, counsel stated: "[W]e submit that in the Seventh Circuit, *injury* isn't a required element of an excessive force claim. I think the use of harm *is an element*."[26] Counsel specifically further told the court that "[i]t's just the extent that [the defendants are] going to argue and there will be any suggestion to the jury that some form of lasting injury

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[23] R.156 at 79.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 78 (emphasis added).

is required under the law, *that's what we would have the objection to.*"[27]

We do not discern on the record any argument presented to the district court that harm itself is not an element of the cause of action or that tasing constitutes harm per se. Consequently, we must agree that Mr. Kingsley's current position on the question of harm itself, or harm per se, has been forfeited.

2.

We now turn to the question whether the district court's clarifying instruction introduced confusion by suggesting to the jury that some unspecified level of injury was required to establish harm. The transcript makes clear that, after voicing the objection to the inclusion of harm and stating that it was out of concern that the defendants would argue need for a lasting injury, counsel for Mr. Kingsley participated in the modification of the instruction and specifically suggested the inclusion of the "[o]r severe injury" language that ultimately was given by the district court to ameliorate the concerns raised in the prior objection. In short, the clarifying instruction was offered at Mr. Kingsley's request, and for the very purpose of minimizing any risk that the jury would construe harm as a significant injury. Mr. Kingsley's counsel actively participated with the district court in achieving an instruction that would be satisfactory in that regard and did not continue an objection to the language as presenting further difficulty or insist on a more specific instruction that any amount of pain qualified as harm. Accordingly, the current objection is waived.

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[27] *Id.* at 79 (emphasis added).

In any event, even if the merits of these objections were properly before us, we previously have approved an instruction in this context that included a requirement of "some harm." *See Wilson*, 83 F.3d at 876. Although it would not have been error for the district court to define injury in a taser case in terms of pain, *see Lewis*, 581 F.3d at 475; *see also Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992), the instruction given by the district court adequately permitted counsel to argue that the pain inflicted fulfilled the injury requirement of the cause of action. Indeed, counsel so argued.

There was no reversible error with respect to the requirement of a showing of "harm" in this case.

Conclusion

Because the jury instructions were neither erroneous nor confusing statements of the law of this circuit, the judgment in favor of the defendants is affirmed.

AFFIRMED

HAMILTON, *Circuit Judge*, dissenting. I respectfully dissent. This case presents an important issue about the extent of a pretrial detainee's constitutional right to be free from punishment and excessive force. If a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was "punished" without due process of law. In this case, however, the district court's jury instruction on excessive force added an unnecessary and confusing element of "reckless" conduct or purpose to the required elements of plaintiff's claim.

The Committee on Pattern Civil Jury Instructions of the Seventh Circuit considered this question in 2009. The committee wisely omitted such language of recklessness or purpose from its Pattern Instructions 7.08 and 7.09 for excessive force claims by pretrial detainees. We should remand for a new trial with instructions tracking those pattern instructions. That way we could avoid the puzzle posed by the majority opinion: When does the Constitution allow law enforcement and correctional officers to use objectively unreasonable force against a person not convicted of a crime?

I. The Problem: Excessive Force Claims by Pretrial Detainees

As the majority explains, when law enforcement officers apply physical force to suspects, detainees, or prisoners, the constitutional standard depends on the status of the person on the receiving end. A person who is not in custody and who is a target of police force, such as in an arrest or investigative stop, is protected by the Fourth Amendment's prohibition on unreasonable seizures of the person. The Fourth Amendment standard is objective: was the application of force unreasonable in light of all the relevant circumstances confronting the officer at the time? *Graham v. Connor*, 490 U.S. 386, 395-97 (1989); Federal Civil Jury Instructions of the Seventh Circuit No. 7.08 & 7.09. On the question of liability for a Fourth Amendment violation, the officer's subjective purposes do not matter as long as the force was used intentionally rather than by accident. *Graham*, 490 U.S. at 397-99.

A person convicted of a crime and serving a custodial sentence is protected by the Eighth Amendment's prohibition on cruel and unusual punishment. The

Eighth Amendment standard differs from the Fourth because the officer's state of mind is critical. The plaintiff must prove that the correctional officer intentionally used extreme or excessive cruelty toward the plaintiff for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); Federal Civil Jury Instructions of the Seventh Circuit No. 7.15. In *Graham*, the Supreme Court explained that the less protective Eighth Amendment standard applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 490 U.S. at 398-99, quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

Both the objective standard under the Fourth Amendment for free citizens and the subjective standard under the Eighth Amendment for sentenced prisoners are well established in the law. The person in between is the pretrial detainee. That person is protected from excessive force by the Due Process Clauses of the Fifth or Fourteenth Amendments because he may not be "punished" until he has been adjudged guilty through due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 & n. 16 (1979); *Ingraham*, 430 U.S. at 671 n. 40. We have recognized that pretrial detainees receive more protection than convicted prisoners. *E.g.*, *Lewis v. Downey*, 581 F.3d 467, 474 (7th Cir. 2009).

Just what the excessive force standard for a pretrial detainee looks like in detail is not as clear. The detainee may often be held in a jail with convicted offenders under conditions that seem indistinguishable from prison, yet he has not been convicted and is still entitled to a presumption of

innocence. The Supreme Court has not settled the question of the standard for pretrial detainees. *Graham* explicitly left it open. 490 U.S. at 395 n.10. Our circuit's case law points in the direction of a standard identical or close to the objective Fourth Amendment standard, but there are conflicting signals in our opinions that we should clarify here.[1]

My colleagues rely heavily on *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), where a pretrial detainee claimed that he had been punished by the use of excessive force, but its guidance does not support the majority here. In *Wilson* we approved the portion of a jury instruction that tracked the objective Fourth Amendment standard. *Id.* at 876 ("While this sentence, lifted verbatim from *Graham*. . . was intended to apply to excessive force claims raised explicitly under the Fourth Amendment, we do not

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[1] There is a long-standing circuit split on the substantive standard for these excessive force claims by pretrial detainees. Compare, e.g., *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (applying objective Fourth Amendment standard); and *Pierce v. Multnomah County*, 76 F.3d 1032, 1042-43 (9th Cir. 1996) (reversing defense verdict and ordering new trial with jury instructions using objective Fourth Amendment standard); with *Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) (applying Eighth Amendment standard); and *Fuentes v. Wagner*, 206 F.3d 335, 346-48 (3d Cir. 2000) (applying Eighth Amendment standard to use of force to quell jail disturbance); see generally Karen M. Blum & John J. Ryan, *Recent Developments in the Use of Excessive Force by Law Enforcement*, 24 Touro L. Rev. 569, 573 (2008) (standards "vary widely"); Baker, *Wilson v. Spain: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 St. John's L. Rev. 449 (2001). Because of the effect of qualified immunity in litigation of these claims, I respectfully submit that our court and/or the Supreme Court needs to bring greater clarity to this question for the sake of both detainees and law enforcement and correctional personnel.

consider it, nor the test which it espouses, inappropriate in the context here."). In other respects, though, the instruction given in *Wilson* was a confusing amalgam of Fourth Amendment, Eighth Amendment, and punitive damages law, along with a defense of subjective good faith that we said was erroneous. See *id.* at 877. We also noted that convicted prisoners and pretrial detainees are often held together in the same facility, so it might be impractical to have different standards, at least in the context of a jail disturbance. *Id.* at 876.

On this last point, though, recall the caution in *Bell* and *Graham* that the Eighth Amendment standard applies only after the state has complied with the constitutional protections needed to convict a person of crime. 441 U.S. at 535; 490 U.S. at 398-99. In light of *Bell* and *Graham* and their constitutional foundations, there is no apparent reason why a state's unilateral decision to house pretrial detainees with convicted prisoners—for financial or other institutional reasons—should have the effect of reducing the constitutional protections of pretrial detainees who are still presumed innocent. The clearest thing about *Wilson* is that it reversed the use of the confusing amalgam of an instruction. It does not support the recklessness instruction given here.

More enlightening is *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), where a pretrial detainee brought a claim for excessive force. We applied the objective reasonableness standard identical to the Fourth Amendment: "It does not follow [from the transition from arrest to detention] that officers acquired greater ability to assault and batter Titran." *Id.* at 147. We explicitly rejected one defendant's effort to apply a subjective standard, and we noted: "Multiple

standards of official conduct send confusing signals that undermine the force of the law. . . ." *Id.* Our holding was clear: "If the officers intentionally restrained, jolted, and roughed up Titran without physical provocation from her, their behavior was unreasonable." *Id.* at 148. That looks like an objective standard.

My colleagues make much of a sentence in *Titran* between the two I have quoted: "Given *Daniels v. Williams* and *Archie v. City of Racine*, holding that the Due Process Clause does not proscribe negligence or even gross negligence, the search for 'punishment' cannot be wholly objective." Id. at 147 (citations omitted). As explained below, however, the point of *Williams* and *Archie* is only that the officer's conduct must be intentional. Negligent accidents do not violate the Constitution. Neither decision added a subjective element of wrongful purpose into the excessive force standard for a pretrial detainee, nor did *Titran* do so. Nevertheless, I will cheerfully acknowledge that our few opinions on excessive force against pretrial detainees leave some room for debate. This case provides an opportunity to clarify the standard, but we are missing that opportunity.

II. The Pattern Jury Instructions

The Committee on Pattern Civil Jury Instructions of the Seventh Circuit took up this problem in 2009 and published with approval of the Circuit Council the pattern jury instructions that advise using the same objective reasonableness standards for excessive force claims by pretrial detainees as well as arrestees. The Circuit Council's publication does not imply substantive approval for every line of the instructions, but the committee chaired by Judge Robert H. Miller, Jr., included talented judges and practitioners

representing a range of perspectives, and the committee invited and received public comment on its draft instructions. The committee's work deserves our respect and close attention.

Pattern Instructions 7.08 and 7.09 were drafted for use in excessive force cases for both arrestees under the Fourth Amendment and pretrial detainees under the Fifth and Fourteenth Amendments. The full texts of the instructions and committee comments are attached as an appendix to this opinion.

The elements instruction, 7.08, includes three elements:

> 1. Defendant used unreasonable force against Plaintiff;
>
> [2. Because of Defendant's unreasonable force, Plaintiff was harmed;]
>
> [3. Defendant acted under color of law.]
>
> The second and third elements are in brackets because there will often be no dispute about them and because it is not clear whether "harm" is a distinct element, as the committee's comment explains.

Instruction 7.09 then explains what is meant by excessive or unreasonable force, and it does so in purely objective terms:

> You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force

> was unreasonable, you must not consider whether Defendant's intentions were good or bad.
>
> In performing his job, an officer can use force that is reasonably necessary under the circumstances.

The committee chose not to identify specific factors, but offered a proposed list for judges who believe such a list might aid a jury:

> — the need for the use of force;
>
> — the relationship between the need for the use of force and the amount of force used;
>
> — the extent of the plaintiff's injury;
>
> — any efforts made by the defendant to temper or limit the amount of force;
>
> — the severity of the crime at issue;
>
> — the threat reasonably perceived by the officer(s);
>
> — whether the plaintiff was actively resisting arrest or was attempting to evade arrest by fleeing.

These pattern instructions are more consistent with the applicable constitutional standard, see *Graham*, *Titran*, and *Wilson*, and much less confusing than the instruction used in this case. The problem is the concept of "recklessness" in the district court's instruction.

III. The Instruction Given in This Trial

The jury instruction given in plaintiff Kingsley's trial, quoted by the majority at pages 8-9, goes astray by introducing the concept of reckless conduct as an additional element the plaintiff must prove. The first line of the instruction given in this trial told the jury

that excessive force is "force applied *recklessly* that is unreasonable in light of the facts and circumstances of the time." In the Fourth Amendment context, excessive force is force that is unreasonable in light of the facts and circumstances the officer faced. *Graham*, 490 U.S. at 396-97; *Fitzgerald v. Santoro*, 707 F.3d 725, 733 (7th Cir. 2013); *Phillips v. Community Ins. Corp.*, 678 F.3d 513, 519 (7th Cir. 2012).

Assuming the pretrial detainee plaintiff can prove force "that is unreasonable in light of the facts and circumstances of the time," which is the correct standard, the concept "recklessly" adds a vague and confusing extra hurdle for the plaintiff. Put another way, how and why would it be constitutional for an officer to use force against a pretrial detainee that was "unreasonable in light of the facts and circumstances of the time," since this instruction invites that very possibility? How and why would objectively unreasonable force be deemed anything other than "punishment" that would be imposed on the detainee without due process of law? See *Bell*, 441 U.S. at 535 ("under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

The instruction here also introduced a second version of recklessness in the third element, saying the plaintiff must show: "Defendants knew that using force presented a risk of harm to plaintiff, but they *recklessly disregarded plaintiff's safety* by failing to take reasonable measures to minimize the risk of harm to plaintiff." I am not at all sure what that means, and I don't know how a juror should have interpreted it. Must the plaintiff come forward with evidence of reasonable measures that would have minimized the risk of harm? Would simply refraining

from the alleged use of force—in this case, using a taser on an allegedly compliant prisoner, or refraining from smashing his head into a concrete bed—have been sufficient? Or was something else required? (I realize that whether the plaintiff was actually compliant by that time and how force was used were hotly debated at trial, but jury instructions must guide the jury on the law applicable to both sides' versions of the facts.)

Adding to the confusion, the same jury instruction then used a third version of recklessness, telling the jury: "in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiffs rights*, you may consider such factors as. . . ." A juror trying to follow the instructions carefully might ask at this point where the idea of reckless disregard of plaintiff's rights came from and what it means. Something different from use of excessive force? Something different from the first two uses of recklessness? Does this instruction mean the defendant must have realized he was violating the detainee's rights, or at least not cared whether he was doing so? Reckless disregard for the plaintiff's rights will support a punitive damage award, so that admittedly subjective concept is used in punitive damage instructions. See *Smith v. Wade*, 461 U.S. 30, 56 (1983); Pattern Inst. No. 7.24. But reckless disregard of the plaintiff's rights is simply not an element of the plaintiff's core case for liability. It was an error to add it to the elements instruction.

So the district court's instruction was erroneous for two reasons. First, it introduced an extra element—recklessness—that is simply not required in a pretrial detainee's claim for excessive force. Second, its treatment of that extra element in three different

ways made this instruction a confusing amalgam that a jury could not reasonably be expected to follow.

As we consider the district court's instruction, we should also step back a moment from the details of the case law and ask whether and why a pretrial detainee's claim for excessive force should differ at all from that of a person being arrested or stopped. The pretrial detainee is still cloaked in the presumption of innocence and may not be punished. *Bell*, 441 U.S. at 535; see also *Graham*, 490 U.S. at 398-99. Ordinarily, of course, a judge will have found probable cause to detain the person. If the detention is prolonged, a judge in the federal system ordinarily will have found either a risk of flight or a danger to the community. See 18 U.S.C. §3142(e).

Even those federal detainees are still presumed innocent, though, and should not be subject to punishment before a conviction. And in many state justice systems, a pretrial detainee may remain in jail for weeks or even months simply because he cannot afford the premium for the presumptive bond set in his case. For those many thousands of people in the criminal justice system, we should recognize that the intentional use of objectively unreasonable force against them amounts to punishment without due process of law and violates the Constitution. They are not and should not be required to prove more in terms of reckless disregard for or intentional violation of their rights. The transition from arrest to pretrial detention does not give officers "greater ability to assault and batter" the detainees. *Titran*, 893 F.2d at 147.

IV. The Role of Intentional or Reckless Conduct

To support the subjective recklessness element in the district court's instruction, my colleagues cite the case law holding that a plaintiff suing under 42 U.S.C. § 1983 for a constitutional violation must show intentional conduct. They then treat reckless conduct as a form of intentional conduct. See above at 13, citing *Daniels v. Williams*, 474 U.S. 327, 334 (1986), and *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc). That reasoning mistakenly combines two separate issues. The same confusion appeared in *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1094 (7th Cir. 1986), and was repeated in *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988), both also cited by the majority. The Pattern Instruction Committee carefully and correctly kept the two issues separate.

In *Daniels* the Supreme Court resolved a circuit split on whether negligent conduct can violate the individual rights guaranteed by the Constitution. The Court's answer was no. In *Daniels* a jail inmate claimed he had been deprived of liberty when he was injured by slipping on a pillow that an employee had negligently left on a staircase. The Court left such claims from accidental conduct to state tort law. 474 U.S. at 332. At the same time, the Court carefully drew the distinction that my colleagues overlook. In response to an argument that prison officials' negligent failure to comply with procedural requirements in depriving a prisoner of good-time credit should be actionable, the Court explained: "We think the relevant action of the prison officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural

protections of the Due Process Clause." *Id.* at 333-34. Applying the same distinction here, the focus should be on a deliberate decision to use force, not a negligent or reckless or intentional failure to comply with the constitutional standard for using force.

In the context of an excessive force claim, *Daniels* means that if, during the removal of Kingsley from his cell, the application of force was not intentional— the taser went off by accident, for example, or a guard slipped, fell, and knocked the handcuffed inmate down so that his head hit the floor—then there would have been no constitutional violation. Reckless conduct is generally recognized as equivalent to intentional conduct for these purposes, when it is equivalent to criminal recklessness, meaning that the actor is subjectively aware of the high risk of harm and then disregards it. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Slade v. Board of School Directors of City of Milwaukee*, 702 F.3d 1027, 1029 (7th Cir. 2012); see also *Archie*, 847 F.2d at 1219.

In an appropriate case, therefore, it could be appropriate to instruct a jury that if the defendant's use of force was reckless (perhaps, for example, running through a crowd with a finger on the trigger of an unaimed gun), that would be sufficient to show intentional use of force. That would be an appropriate role for the concept of recklessness in an excessive force case. But there is no need for such an instruction unless the defense contends the use of force was unintended. The defense did not argue that here, so there was no need for a subjective element in the instruction.[2]

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[2] Section 1983 and *Bivens* excessive force cases in which defendants contend the application of force was accidental appear

My colleagues' reliance on the need for intentional conduct to justify the subjective recklessness elements of the instruction given here also proves too much. As explained above, intentional conduct is needed to show *any* constitutional violation, including the Fourth Amendment, where the standard for excessive force is objective. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"), citing *Daniels*, 474 U.S. at 328; *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) ("seizure" requires "intentional acquisition of physical control" through "means intentionally applied"). That is why an accidental police shooting is not actionable under the Fourth Amendment, see *Watson v. Bryant*, 532 Fed. Appx. 453, 457 (5th Cir. 2013); *Pleasant v. Zamieski*, 895 F.2d 272, 276-77 (6th Cir. 1990); *Dodd v. City of Norwich*, 827 F.2d 1, 7-8 (2d Cir. 1987) (on reargument), but an *intentional* shot that accidentally hits the wrong person is a seizure of that person that may be actionable under the Fourth Amendment, *Fisher v. City of Memphis*, 234 F.3d 312, 317-18 (6th Cir. 2000).

The court in *Fisher* explained precisely the difference that my colleagues' reasoning overlooks. After recognizing that a Fourth Amendment violation requires intent, not negligence, the Sixth Circuit explained: "However, the intent in question is the intent to commit the act, not the intent that a certain result be achieved. Therefore, Officer Taylor's act of

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to be relatively unusual, but they do arise. The Pattern Instruction Committee allowed for them. Its comment on Instruction 7.08 advises judges in such cases to break the first element of unreasonable force into two parts: intentional use of force and unreasonable use of force.

firing the gun was intentional, even if the result was not one he sought to achieve. Instructing the jury that more than negligence was required would likely confuse the jury as to the intent question." *Id.* at 317. Again, because the defendants at this trial did not claim the use of force was accidental, there was no reason to introduce the concept of recklessness into the excessive force instruction.

Before closing, I should add that I have considerable sympathy for both this district judge and any other judge trying to distill our case law into a coherent elements instruction for a pretrial detainee's excessive force claim. Some of the cases cited by the majority—especially *Wilson*—reflect similar confusion. But that is why the work of the Pattern Instruction Committee was so valuable. We should endorse their work, not reject it.

Finally, I agree with the majority that plaintiff Kingsley waived in the district court his challenge to the "harm" element of the court's instruction on excessive force. As for the merits of that challenge, which the majority also addresses, I see no prejudicial error by including harm as an element. The Pattern Instruction Committee also confronted this issue as part of its Instruction 7.08 and could not come to a definitive conclusion. The committee's comment gives good advice and leaves the choice to the sound judgment of the district court. In most excessive force cases, harm is likely to be so obvious that it does not require treatment as a separate element. (It will ordinarily be relevant in deciding whether the force applied was excessive or in deciding on an amount of damages.) If the defense argues that the force used was too minimal to violate the plaintiff's rights, the plaintiff should not be prejudiced if the district judge

includes harm as an element but also instructs the jury, as the court did here, that pain can be harm for purposes of proving that element.

For these reasons, I would reverse the judgment of the district court and remand for a new trial with jury instructions that track Seventh Circuit Pattern Jury Instructions 7.08 and 7.09.

APPENDIX

7.08 FOURTH AMENDMENT/FOURTEENTH AMENDMENT: EXCESSIVE FORCE AGAINST ARRESTEE OR PRETRIAL DETAINEE — ELEMENTS

In this case, Plaintiff claims that Defendant used excessive force against him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant used unreasonable force against Plaintiff;

[2 Because of Defendant's unreasonable force, Plaintiff was harmed;]

[3 Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff did not prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

Committee Comments

a. Unreasonable Force: For authority regarding the "unreasonable force" element of the claim, see *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999). Although *Graham* and *Garner* are Fourth Amendment cases involving arrestees, *Wilson v. Williams*, 83 F.3d 870, 876 (7th Cir. 1996), states that the same standard applies to pretrial detainees. A separate instruction applies to cases involving convicted prisoners.

If the defendant contends that the application of force was accidental, the court may wish to break the first element into two:

1. Defendant intentionally used force against Plaintiff;

2. The force Defendant used was unreasonable;

b. Harm to Plaintiff: Although some other circuits include an element of "damage" in their pattern instruction, *see, e.g.*, EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 4.30 (1999), the Committee believes that there is significant doubt as to whether damage, or "harm" as that term is commonly understood, is actually required for a finding of liability under §1983. Though "harm" in the commonly-understood sense is likely to exist in most excessive force cases, some cases will arise in which it does not, *e.g.*, a situation in which an officer strikes the plaintiff with his hand but leaves no mark and causes no lingering injury or pain. In such cases, the court will need to determine whether the jury should be instructed on this point.

In *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), the court held that an officer's use of force was unconstitutional if it (1) caused severe injuries; (2) was grossly disproportionate to the need for action under the circumstances; and (3) was inspired by malice or shocked the conscience. *Gumz*, however, was overruled by *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), which used the same "totality of the circumstances test" that was later adopted by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). In *Lanigan v. Village of East Hazel Crest, Illinois*, 110 F.3d 467 (7th Cir. 1997), the court upheld a claim based on force consisting of "one violent push and poke," noting that the plaintiff "need not have been injured to have an excessive force claim." *Id.* at 470 n.3. In *McNair v. Coffey*, 279 F.3d 463 (7th Cir. 2002), the court addressed a claim arising from an incident in which no physical force was used, but officers pointed their weapons at the plaintiffs. Though it determined that the officers were entitled to qualified immunity, and indicated that the Fourth Amendment appeared to require *some* use of force, *id.* at 467, the majority ended its opinion with the statement "we do not foreclose the possibility that the circumstances of an arrest could become 'unreasonable' without the application of physical force." *Id.* at 468. *See also Herzog v. Village of Winnetka, Ill.*, 309 F.3d 1041, 1043 (7th Cir. 2002) (refusal to loosen chafing handcuffs or shoving an arrestee would constitute actionable excessive force).

Even if, as *McNair* indicates, an application of force is required in order to implicate the Fourth Amendment, it is not at all clear that the plaintiff must suffer "harm" in order to obtain a finding of liability; the availability of nominal damages in excessive force cases suggests that "harm" is not a

requirement. *See, e.g., Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996) (indicating that nominal damages may be awarded in a Fourth Amendment excessive force case where no injury resulted from the use of excessive force, where the evidence of actual injury is not credible, or where the injury has no monetary value). Because the issue of whether a plaintiff must prove "harm" is not definitively resolved, the Committee placed the second element in brackets, indicating that a court should give this part of the instruction to the jury at its discretion.

c. Third element: The third element should be eliminated if the "color of law" issue is not in dispute.

d. Single Element Instruction: If the second and third elements are eliminated, only one element will remain, and the instruction's second sentence should read as follows: "To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant used unreasonable force against him."

7.09 FOURTH AMENDMENT/FOURTEENTH AMENDMENT: EXCESSIVE FORCE—DEFINITION OF "UNREASONABLE"

You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force was unreasonable, you must not consider whether Defendant's intentions were good or bad.

In performing his job, an officer can use force that is reasonably necessary under the circumstances.

[An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect's actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm. [It is not necessary that this danger actually existed.] [An officer is not required to use all practical alternatives to avoid a situation where deadly force is justified.]]

Committee Comments

a. Authority: *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); Deering v. Reich, 183 F.3d 645 (7th Cir. 1999).

b. Factors: Case law establishes a number of factors that may be relevant to the jury's determination of whether a particular use of force was unreasonable. The Committee did not list these factors in the instruction because the jury is to consider *all* circumstances, and the listing of some might suggest that others are irrelevant. However, a court may wish to consider giving a list of factors for the jury's consideration, and if it elects to do so the following is proposed:

— the need for the use of force;

— the relationship between the need for the use of force and the amount of force used;

— the extent of the plaintiff's injury;

— any efforts made by the defendant to temper or limit the amount of force;

— the severity of the crime at issue;

— the threat reasonably perceived by the officer(s);

— whether the plaintiff was actively resisting arrest or was attempting to evade arrest by fleeing.

See Graham v. Connor, 490 U.S. at 396 (fifth, sixth, and seventh factors). In *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), a Fourteenth Amendment excessive force case involving a pretrial detainee, the Seventh Circuit listed factors one, two, three, four, and six from the above list, and stated that they are "generally relied on in the Fourth Amendment excessive force context." *Id.* at 876. For this proposition, however, the court cited *Hudson v. McMillian*, 503 U.S. 1, 7 (1992), which was an Eighth Amendment case, not a Fourth Amendment case. *See generally* Eighth Circuit Manual of Model Jury Instructions (Civil) 4.10 (1999) (using factors one, two, and three).

c. Deadly Force: The final (bracketed) paragraph applies only in cases involving an officer's use of deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988). With regard to the final (bracketed) sentence of this paragraph, *see Deering v. Reich*, 183 F.3d 645, 652-653 (7th Cir. 1999); *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994). The fact that a particularized instruction is proposed for deadly force cases does not preclude the consideration or giving of a particularized instruction in other types of cases, for example, those involving a fleeing felon or an officer's claim of self-defense.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-3639

MICHAEL B. KINGSLEY,

Plaintiff-Appellant,

v.

STAN HENDRICKSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 3:10-cv-00832-bbc
Barbara B. Crabb, Judge.

MARCH 3, 2014

FINAL JUDGMENT

Before: KENNETH F. RIPPLE and DAVID F. HAMILTON, Circuit Judges, and J.P. STADTMUELLER, District Court Judge.*

---

* The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

The judgment of the District Court is AFFIRMED in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-3639

MICHAEL B. KINGSLEY,

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Barbara B. Crabb, Judge.

APRIL 18, 2014

ORDER

Before: KENNETH F. RIPPLE and DAVID F. HAMILTON, Circuit Judges, and J.P. STADTMUELLER, District Judge.*

---

* The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

Upon consideration of Plaintiff-Appellant's petition for rehearing with suggestion of rehearing en banc, filed on March 17, 2014, no judge in active service has requested a vote thereon.** A majority of the judges on the original panel have voted to deny the petition. Judge Hamilton voted to grant panel rehearing.

IT IS ORDERED that the petition for rehearing with suggestion of rehearing en banc is hereby DENIED.

** Circuit Judge Flaum took no part in the consideration or the decision of this case.

Supreme Court, U.S.
FILED
MAR 2 - 2015
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No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

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OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Western District of Wisconsin, is reported at 744 F.3d 443 and is reprinted in the Joint Appendix (J.A.) at J.A. 288–331. The court of appeals' order denying the petition for rehearing en banc is unreported and reprinted at J.A. 334–35. The judgment of the district court is unpublished and is reproduced at J.A. 287.

JURISDICTION

The court of appeals entered judgment on March 3, 2014, J.A. 332–33, and denied Mr. Kingsley's petition for rehearing en banc on April 18, 2014, J.A. 334–35. On July 2, 2014, this Court granted a timely filed application (No. 14A11) to extend the time to file a petition for a writ of certiorari until August 18, 2014. The petition was timely filed on August 18, 2014. This Court granted the petition on January 16, 2015, and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

INTRODUCTION

This case involves a pretrial detainee's excessive force claim under 42 U.S.C. § 1983. Petitioner Michael Kingsley argued that the respondent jail officers used objectively unreasonable force when they tased him as he lay facedown on a concrete bunk, handcuffed behind his back, and surrounded by four jail officers, one of whom had his knee on Mr. Kingsley's back. Under the district court's instructions to the jury, later approved by the Seventh Circuit, that objective showing would be insufficient to state an excessive force claim under § 1983. Instead, the court held that, under the test applicable to claims of excessive force against pretrial detainees, Mr. Kingsley would also need to prove subjective elements: that the officers applied force "recklessly," "recklessly dis-

regarded [his] safety," and "acted with reckless disregard of [his] rights." J.A. 278.

The district court's jury instructions were incorrect. A pretrial detainee, who has not been convicted of any crime, may prove a constitutional violation by showing that state actors used objectively unreasonable force. And, although the first step in analyzing a plaintiff's excessive force claim is identifying the particular constitutional right involved, the outcome here is the same whether the Court chooses to proceed under the Due Process Clause or the Fourth Amendment. The objective unreasonableness standard applies to claims under the Due Process Clause, which protects pretrial detainees (like other individuals) against deprivations of liberty that result from the arbitrary use of government force. It also applies to pretrial detainees' claims that state officers have violated the Fourth Amendment's protections against unreasonable physical seizures. Whichever constitutional provision is applied to Mr. Kingsley's claim, the Seventh Circuit erred in approving the jury instructions, and the case should be remanded for a new trial.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Michael Kingsley was arrested and booked into the Monroe County Jail in Sparta, Wisconsin on April 21, 2010. J.A. 42, 289. He was being detained pending trial at the time of the incident that gave rise to his excessive force claim.[1]

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[1] Specifically, by the time of the incident on May 21, 2010, Mr. Kingsley had appeared at a bond hearing, as well as an initial appearance under Wis. Stat. § 970.01. Court Record Events, *State* v. *Kingsley*, Monroe Cnty. Case No. 2010CF000134, Wis.

In the late evening of May 20, 2010, and again in the early morning of May 21, 2010, jail officers ordered Mr. Kingsley to remove a piece of paper that was affixed to the light in his cell. J.A. 126–28.[2] Mr. Kingsley told the officers that he had not put the paper there, and refused to remove it. J.A. 42–43.

The officers decided to transfer Mr. Kingsley to a "receiving" cell so that jail staff could remove the paper. J.A. 44. Defendants, Sergeant Stan Hendrickson and Deputy Fritz Degner (respondents here), and three other officers participated in the transfer. *Id.* To accomplish it, the officers first entered Mr. Kingsley's cell and handcuffed him behind his back while he was lying face down on his bunk. *Id.* Mr. Kingsley testified that the handcuffs were extremely tight. J.A. 131. During the transfer, the officers banged Mr. Kingsley's leg against the bunk in picking him up, causing pain in his foot and making it difficult for him to walk. *Id.* The officers then carried Mr. Kingsley from the original cell to the receiving cell. Although Mr. Kingsley did not walk of his own volition, he did not threaten or actively resist the officers—rather, he groaned and complained that he could not

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Ct. System Cir. Ct. Access, http://wcca.wicourts.gov/courtRecordEvents.xsl;jsessionid=7A2D5D6D02D8EBE639C94767A8D8A88D.render6?caseNo=2010CF000134&countyNo=41 (last visited Mar. 1, 2015). He had not had a complete preliminary examination under Wis. Stat. § 970.03 (a preliminary examination had commenced on May 13, 2010, but had been continued to June 11 before testimony was complete), and had not yet been arraigned pursuant to Wis. Stat. § 971.05. *Id.*

[2] As Mr. Kingsley later testified, jail inmates often put a piece of paper over the cell light, and the paper in his cell was already there when he was transferred to that cell about a month earlier. J.A. 127–29. As the court below noted, inmates cover the light with paper to dim the brightness of the light. J.A. 289–90.

walk. J.A. 291. Portions of the transfer were captured on video. J.A. 45.

In the receiving cell, Mr. Kingsley was placed face down on a cement bunk with his hands still cuffed behind his back. *Id.* The jail officers surrounded Mr. Kingsley, blocking the view of the cell's only camera, and Sergeant Hendrickson placed his knee on Mr. Kingsley's back. J.A. 132–33. The officers tried to remove the handcuffs, but had difficulty doing so. J.A. 45–46. The parties dispute whether Mr. Kingsley was resisting removal of the handcuffs by tensing his arms. J.A. 291–92.

Sergeant Hendrickson, who still had his knee on Mr. Kingsley's back, directed Deputy Degner to "tase" Mr. Kingsley, ostensibly to permit the officers to remove the handcuffs. J.A. 292. Deputy Degner tased Mr. Kingsley on his upper back for five seconds, resulting in extreme pain. *Id.* Afterwards, the officers left the cell, leaving Mr. Kingsley alone on the bunk while still handcuffed. J.A. 46. Other officers were later able to remove Mr. Kingsley's handcuffs without incident. *Id.*

B. Proceedings Below

Mr. Kingsley filed suit pro se pursuant to 42 U.S.C. § 1983, alleging, among other things, that Sergeant Hendrickson and Deputy Degner used excessive force during the incident. J.A. 292. The officers filed a motion for summary judgment, which the district court denied as regards Mr. Kingsley's excessive force claim based on the events in the receiving cell. J.A. 41. Specifically, after viewing a video of the events in the receiving cell, the district court noted that it was "not clear . . . whether plaintiff was resisting or struggling. [He did] not appear to be moving his body around aggressively or very much at all." J.A. 45.

The court ruled there was a genuine issue of material fact whether the officers' use of force was disproportionate to the situation. J.A. 50–51.

The court also concluded that the officers were not entitled to qualified immunity. Applying the Eighth Amendment standard for excessive-force claims, it found that "[t]he notion that unnecessary and wanton infliction of pain constitutes cruel and unusual punishment" was not a new legal principle. The court further observed that pretrial detainees are entitled to "at least as much protection from excessive force" as convicted prisoners. J.A. 49, 53–54. Following the denial of the officers' motion for summary judgment, the district court appointed pro bono counsel to represent Mr. Kingsley at trial. J.A. 16, 294.

At the trial, both parties presented experts on the use of force. Mr. Kingsley presented the testimony of an expert witness, Brian Landers, a veteran police officer, academy instructor, and a member of the Wisconsin Department of Justice Tactical Advisory Committee on Defense and Arrest Tactics. J.A. 145–48. Mr. Landers opined that, under the totality of the circumstances, the use of the taser did not comport with professional standards and was unreasonable because Mr. Kingsley did not exhibit active resistance during the incident. J.A. 156, 164–65. Mr. Landers also stated his opinion that the officers had not properly handcuffed Mr. Kingsley, which may have led to their difficulty in removing the handcuffs. J.A. 165–66.

At the final pretrial conference, Mr. Kingsley requested that the court use the Seventh Circuit's pattern jury instruction relating to excessive force claims. J.A. 76–77. The defendant guards requested an instruction for excessive force claims under the Eighth Amendment. J.A. 65. The trial court, over

both parties' objections, proposed its own instruction. J.A. 113–15. At the jury instruction conference, Mr. Kingsley renewed his objection to the district court's proposed instruction, pointing out that it required a showing that the guards used force with a specified subjective intent, which was at odds with the Seventh Circuit's pattern instruction for § 1983 excessive force claims. J.A. 229–30. Mr. Kingsley stated that the standard for excessive force claims brought by pretrial detainees should track the Fourth Amendment and require only a showing that the use of force was objectively unreasonable under the circumstances. *Id.* Mr. Kingsley further argued that the district court's proposed instruction would confuse the jury. J.A. 229, 231.

Over Mr. Kingsley's objection, the district court deviated from the pattern jury instructions and required Mr. Kingsley to show that defendants applied force "recklessly," "recklessly disregarded plaintiff's safety," and acted with "reckless disregard of plaintiff's rights." J.A. 233, 277–78. With these phrases placed in context, the jury instructions were as follows:

> Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;
>
> (2) Defendants' use of force was unreasonable in light of the facts and circumstances of the time;
>
> (3) Defendants knew that using force presented a risk of harm to plaintiff, but they *reck-*

lessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiff's rights*, you may consider factors such as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.

J.A. 277–78 (emphases added).

Following these instructions and deliberations, the jury found for the defendants. The district court entered judgment, and Mr. Kingsley timely appealed.

On appeal to the Seventh Circuit, Mr. Kingsley again argued that under prevailing case law, the ap-

plicable standard for an excessive force claim brought by a pretrial detainee is whether the challenged conduct is an objectively unreasonable use of force in the circumstances. Appellant's Br. 11–16. Mr. Kingsley further argued that to the extent a showing of intent is required, that requirement is met where the conduct is deliberate, as opposed to merely negligent. Appellant's Br. 13. Finally, Mr. Kingsley argued that the jury instructions as given were likely to have confused the jury and prejudiced him at trial. Appellant's Br. 8, 14, 18, 22.

On March 3, 2014, a divided panel of the Seventh Circuit affirmed. The majority applied the Due Process Clause of the Fourteenth Amendment in evaluating Mr. Kingsley's excessive force claim because it found that a pretrial detainee is neither an arrestee (protected from unreasonable seizure by the Fourth Amendment) nor a sentenced prisoner (protected from cruel and unusual punishment by the Eighth Amendment). Rather, it concluded that a pretrial detainee is entitled to an intermediate level of protection. J.A. 297. Notably, the panel first highlighted that the controlling case in the Circuit held that "the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them." J.A. 301. But the panel nonetheless concluded that the test is not wholly objective.[3] It as-

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[3] In their brief in the court of appeals, respondents asserted that they were entitled to qualified immunity. Appellees' Br. 28–29. Mr. Kingsley argued in response that respondents waived this argument in the district court and that, in any event, it was incorrect because an officer would not have qualified immunity if he used *objectively unreasonable* force under the circumstances. Reply Br. 8–10. The court of appeals did not

serted that the Circuit's prior cases "make clear that, although we employ the objective criteria of the Fourth Amendment as a touchstone by which to measure the gravity of the defendant officer's conduct, we also recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny" when examining a claim arising under the Fourteenth Amendment. J.A. 303, 307.

Judge Hamilton dissented. He criticized the panel majority for introducing a new, additional element into the claim and effectively allowing officers an escape hatch, even when they use objectively unreasonable force. J.A. 311–12 (asking "[w]hen does the Constitution allow law enforcement and correctional officers to use *objectively unreasonable* force against a person not convicted of a crime?" (emphasis added)). In the dissent's view, "[i]f a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was 'punished' without due process of law." J.A. 311. The dissent also stated that the district court's insertion of recklessness into the instruction added a "vague and confusing extra hurdle for the plaintiff." J.A. 319. Instead, the dissent asserted, Mr. Kingsley should have been given a new trial with the Circuit's current pattern jury instructions that do not require jurors to find that an officer acted with a specific subjective intent. J.A. 326.

The Seventh Circuit denied Mr. Kingsley's timely petition for rehearing en banc. J.A. 334–35.

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address the parties' qualified immunity dispute. Respondents mentioned qualified immunity only in passing during the *certiorari* stage, in a footnote. *See* Br. Opp'n 17 n.1.

SUMMARY OF THE ARGUMENT

The issue in this case is whether government officials may intentionally use objectively unreasonable force against a pretrial detainee with impunity, at least so long as they do not act with malice or recklessness or some other bad mental state. The court of appeals below held that—no matter how arbitrary and unreasonable a use of force may be—a detainee cannot establish a violation of his constitutional rights without proving that an officer "had the requisite state of mind." J.A. 303. This Court's precedents impose no such requirement. This Court requires that a plaintiff pursuing an excessive force claim under the Constitution first "identify[] the specific constitutional right allegedly infringed." *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). However, whether viewed through the lens of the Due Process Clause or of the Fourth Amendment, a pretrial detainee's constitutional protection from unjustified physical intrusion does not turn on an officer's private thoughts.

The Due Process Clause of the Fourteenth Amendment protects individuals against the arbitrary exercise of government power. As this Court explained in *County of Sacramento* v. *Lewis*, for example, due process prohibits an executive official's "exercise of power without any reasonable justification in the service of a legitimate governmental objective." 523 U.S. 833, 846 (1998). Nothing in this Court's due process jurisprudence suggests that an officer's subjective motivations can excuse objectively unreasonable physical violence. Nor does a pretrial detainee lose the protections of the Due Process Clause upon booking. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979) (noting that pretrial detainees retain their due process rights).

This Court's decision in *Bell* set forth a standard for evaluating due process challenges to a pretrial detainee's conditions of confinement, and it provides an appropriate basis for analyzing excessive force claims as well. *Bell* held that a deprivation of liberty with the "expressed intent to punish" a pretrial detainee violates due process, 441 U.S. at 538; but a pretrial detainee can also demonstrate a due process violation by proving that the state's use of force against him was "excessive in relation to," or not "reasonably related to," a legitimate government interest. *Id.* at 538–39. In other words, a detainee can prevail by showing *either* (a) improper motivation to punish *or* (b) an objectively unjustified deprivation. The latter standard requires no inquiry into the officer's state of mind.

The balancing of interests that is central to the due process analysis, as exemplified in *Bell*, is precisely the same approach that the Court has developed in its "excessive force" cases under the Fourth Amendment. And, in fact, the Court has held that the Fourth Amendment "must be the guide for analyzing" claims that officers have used "excessive force" in the course of a "'seizure' of a free citizen" because it "provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct." *Graham*, 490 U.S. at 395. Following *Graham*, the Fourth Amendment establishes the standard governing the state's use of force against pretrial detainees.

This Court could reasonably hold that Fourth Amendment protections extend to a pretrial detainee on the theory that he or she is subject to a "continuing seizure"—but there is no need to go that far in this case. At the very least, the Fourth Amendment's protections apply when an official's actions against a

detainee are so physically intrusive as to constitute a new "seizure," separate and apart from the existing lawful detainment. Any such seizure is evaluated under the objective unreasonableness standard of the Fourth Amendment. See *Graham*, 490 U.S. at 396. And the test for reasonableness is an objective one, requiring "careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985)).

Regardless of whether this Court evaluates excessive force claims brought by pretrial detainees under the Due Process Clause or under the Fourth Amendment, the fundamental rule is the same: the Constitution bars the application of force that is excessive when balanced against a legitimate government interest. Pretrial detainees need only make an objective showing to meet that standard, which neither invites nor requires an inquiry into the private thoughts of the government actor.

ARGUMENT

The jury instructions at Mr. Kingsley's trial erroneously required him to affirmatively prove a particular subjective element—recklessness—to prevail on his excessive force claim. That requirement is inconsistent with this Court's approach to similar constitutional claims.

The Court has explained that the first step in addressing a claim of excessive force is "identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham* v. *Connor*, 490 U.S. 386, 394 (1989) (citing *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979)). This Court has expressly left open the question whether pretrial detainees' ex-

cessive force claims are governed by the Due Process Clause or the Fourth Amendment. See *Graham*, 490 U.S. at 395 n.10. However, under either Amendment, a pretrial detainee demonstrates that the state has used excessive force in violation of the Constitution if he shows that the use of force was deliberate (rather than negligent) and was objectively unreasonable under the circumstances. He is not required to prove that the officer acted with a particular subjective motivation such as malice or recklessness.

As demonstrated in Part I, the use of an objective reasonableness test to determine whether a pretrial detainee has been deprived of liberty without due process of law follows naturally from this Court's existing approach to claims arising from the treatment of pretrial detainees, embodied in *Bell* v. *Wolfish*, 441 U.S. 520, 535–39 (1979). And, as shown in Part II, an objective reasonableness test also applies if such claims are properly brought under the Fourth Amendment, which is the more particularized constitutional right governing the "seizure" here.[4] Accordingly, the jury instructions below were incorrect no matter which Amendment is applied to Mr. Kingsley's claim, and the case should be remanded for a new trial.

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[4] This case presents no Eighth Amendment question. That Amendment's prohibition against cruel and unusual punishment is triggered only by conviction of a crime. *See Graham*, 490 U.S. at 398 ("the less protective Eighth Amendment standard applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'") (quoting *Ingraham* v. *Wright*, 430 U.S. 651, 671 n.40 (1977)). Accordingly, it does not apply to pretrial detainees, who have not yet been convicted of any crime.

I. A STATE ACTOR'S DELIBERATE USE OF OBJECTIVELY UNREASONABLE FORCE AGAINST A PRETRIAL DETAINEE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Graham*, this Court noted that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." 490 U.S. at 395 n.10 (citing *Bell*, 441 U.S. at 535–39). But a threshold question is whether the right to freedom from punishment constitutes the *full extent* of the due process right that pretrial detainees possess in all circumstances while in jail or whether pretrial detainees have more robust due process protections in some settings. *Bell* was, after all, a case about conditions of confinement, not about excessive force; and this Court has not determined that the Due Process Clause applies in this excessive force setting, let alone its standard or test.[5] In fact, *Bell* itself recognized that the protections of due process may extend beyond the narrow context of "punishment" of pretri-

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[5] For example, some courts of appeals have found that when a state officer deliberately uses physical force wholly disproportionate to or unreasonable in light of any legitimate need or purpose of the state, that action violates the Due Process Clause. *See, e.g.*, *Robles* v. *Prince George's Cnty.*, 302 F.3d 262, 269–70 (4th Cir. 2002) (police officers violated due process by handcuffing a detainee to a metal pole in a deserted mall parking lot, leaving him unattended at night for 10 to 15 minutes, without any legitimate state purpose); *see also Estate of Booker* v. *Gomez*, 745 F.3d 405, 424 (10th Cir. 2014) (violation of due process where force used against detainee, including a taser and a carotid neckhold, was "not proportional to the need presented."); *Jones* v. *Wellham*, 104 F.3d 620, 628 (4th Cir. 1997) (violation of due process where police officer raped plaintiff); *Gray* v. *Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (beating and threatening plaintiff if he would not confess violates due process).

al detainees. See, *e.g.*, 441 U.S. at 536–37 (noting that conditions of pretrial detention are lawful "so long as those conditions and restrictions do not amount to punishment, or *otherwise violate the Constitution.*" (emphasis added)).

However, this Court need not decide here whether the proper standard is one that recognizes greater protection for pretrial detainees than the *Bell* freedom-from-punishment test. As shown below, that test prohibits state officers from deliberately using objectively unreasonable force against pretrial detainees. Moreover, if the Court were to decide not to use the *Bell* test in cases involving pretrial detainees' claims of excessive force, it should apply a Fourth Amendment standard to the new "seizure" that occurs when force is used against such detainees, see Part II below.

A. The Due Process Clause Prohibits Arbitrary, Objectively Unreasonable, Deliberate Acts Of Official State Violence, Including Against Pretrial Detainees.

This Court has "emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" *Cnty. of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974)); see also *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (the Due Process Clause "was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado* v. *California*, 110 U.S. 516, 527 (1884))). When the acts of executive officials are at issue, the Due Process Clause prohibits "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Lewis*, 523 U.S. at 846.

The concerns regarding arbitrary and unreasonable executive action that animate the Due Process Clause are implicated most strongly when intentional acts of violence and restraint by government officials are at issue. See, *e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307, 316 (1982) ("'Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (alteration omitted) (quoting *Greenholtz* v. *Neb. Penal Inmates*, 442 U.S. 1, 18 (1979))); *Ingraham* v. *Wright*, 430 U.S. 651, 673–74 (1977) ("While the contours of this historic liberty interest . . . have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment."). This Court has long recognized that to permit officials to commit violence "unjustifiable by any government interest," *Lewis*, 523 U.S. at 849, would be "to afford brutality the cloak of law." *Rochin* v. *California*, 342 U.S. 165, 173 (1952).

This protection from arbitrary and unjustified acts of violence extends to individuals who have been detained but who have not been convicted of any crime. See *Graham*, 490 U.S. at 395 n.10. *Bell* held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. at 535. As this Court later explained, the *Bell* Court "weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty" and determined that "detainees, not yet convicted of the crime charged, could not be punished." *Youngberg*, 457 U.S. at 320. Thus, *Bell* stands for the proposition that punishment of pretrial detainees is not, by itself, a "legitimate governmental objective." *Bell*, 441 U.S. at 539. See also *id.* ("[I]f restriction or condition is not reasonably related to a legitimate

goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.").

Bell was focused on due process protections relating to the conditions of pretrial confinement, see 441 U.S. at 535-39, but it nevertheless provides a useful starting point for adjudicating excessive force claims brought by pretrial detainees. "It is clear" from *Bell* that, at the very least, "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395 n.10 (citing *Bell*, 441 U.S. at 535–39). And *Bell*'s test for determining when the conditions of confinement for pretrial detainees violate the Due Process Clause may also be applied in cases involving state officers' use of excessive-force against those detainees.

In *Bell*, this court analyzed "particular restrictions and conditions" under the Due Process Clause without requiring a showing of an expressed intent to punish:

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination [whether the detainee's due process right has been violated] generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment."

441 U.S. at 538 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). Thus, while a pretrial detainee can show that a "particular restriction[] or condition[]" violates the Due Process Clause by demonstrating that the relevant state officer had an "expressed intent to punish," he can also show a constitutional violation by demonstrating that the officer's deliberate action was not "reasonably related to a legitimate governmental objective." In the latter circumstances, a violation of due process can be established without regard to the officer's mental state. *Id.* at 538–39.

B. Under *Bell*, A Plaintiff May Prove A Due Process Claim With Purely Objective Evidence.

As explained above, an intentional use of physical force that constitutes an arbitrary and unreasonable executive action violates a person's due process rights. This standard may be satisfied with purely objective evidence of the government official's deliberate conduct in the relevant circumstances. In other words, the plaintiff need not prove that the officer had a particular mental state such as malice or recklessness.

In the particular case of a pretrial detainee's excessive force claim, the language of *Bell*, supported by this Court's due process jurisprudence, demonstrates that a plaintiff may prevail with a purely objective showing that the use of force amounts to punishment under the circumstances. If jail officials had no "expressed intent to punish," a pretrial detainee can show that the use of force is not "rationally [] connected to" a legitimate government purpose, or that the force was "excessive in relation to" its stated purpose. *Bell*, 441 U.S. at 538 (quoting *Mendoza-*

Martinez, 372 U.S. at 168–69 (alterations in original)). Each of the latter two showings is objective.

1. *Bell* Creates An Objective Test For Determining "Legitimate" State Goals.

As noted, in *Bell*, this Court explained that the Due Process Clause prevents the state from imposing restrictions on a pretrial detainee "not reasonably related to a legitimate goal." 441 U.S. at 539. *Bell* made clear that the question whether a professed government interest is legitimate is to be answered objectively. The *Bell* Court listed several legitimate purposes for restrictions on pretrial detainees, including "ensuring a detainee's presence at trial" and "manag[ing] the facility in which the individual is detained." *Id.* at 540. The Court did not "attempt to detail the precise extent" of permissible government interests. *Id.* Instead, its analysis made clear that whether a proffered purpose is "legitimate" does not turn on the subjective motivation of the officers. See *id.* (describing particular purposes that may justify restrictions and deprivations—such as the need to "make certain no weapons or illicit drugs reach detainees"—rather than officials' subjective beliefs that government interests legitimately included such goals).

Substantive due process cases in other settings have elaborated on the objective nature of this inquiry. For example, in *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), a case involving a high speed police chase, this Court observed that "conduct intended to injure in some way unjustifiable by any government interest" is the type of action "that would most probably support a substantive due process claim." *Id.* at 849. But the Court has never suggest-

ed that an act must be not only deliberate,[6] but also taken *in bad faith or recklessly*, to be a deprivation of liberty actionable under the Due Process Clause. Instead, the Court has recognized that due process claims are analyzed by "weigh[ing] the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg*, 457 U.S. at 320. This balancing inquiry allows for the possibility that an official acting in subjective good faith may violate an individual's due process rights if the action does not further any legitimate government purposes.

Following this Court's lead, courts should apply *Bell*'s objective analysis of the legitimacy of a state's purpose to due process claims generally. For instance, in *Robles* v. *Prince George's County*, 302 F.3d 262 (4th Cir. 2002), police officers, tasked with transferring a pretrial detainee into custody of a neighboring jurisdiction, instead handcuffed the detainee to a metal pole and left him unattended at night in a deserted parking lot until the other officers arrived 10 or 15 minutes later. Judge Wilkinson explained that these objective facts showed the officers' actions to be

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[6] The protections of the Due Process Clause do not extend to *negligent* acts—a requirement this Court has found inherent in the term "deprivation." *Daniels*, 474 U.S. at 331. "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.* For this reason, a pretrial detainee must show that the use of force was more than merely negligent. For example, in this case, as the dissent below noted, if the defendants' "application of force was not intentional"—if, hypothetically, "the taser went off by accident"—"then there would have been no constitutional violation." *See* J.A. 323. However, respondents have never argued that respondent Degner's use of the taser against Mr. Kingsley, or respondent Hendrickson's instruction that Degner do so, was unintentional.

"entirely unrelated" to any legitimate state purpose. *Id.* at 269. The officers' subjective motivations—whether malicious or "merely immature"—were irrelevant: "Even a so-called prank that fails to serve any 'legitimate governmental objective' can constitute a due process infraction." *Id.* at 269–70 (quoting *Bell*, 441 U.S. at 539).

The use of an objective "legitimate purpose" test is particularly appropriate in light of the substantial deference to government officials already built into the *Bell* test. As when a legislative action is challenged on rational basis grounds, see, *e.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985), courts considering executive actions show significant respect to state officials' characterizations of state interests and explanations of how particular actions further those purposes. Indeed, *Bell* itself recognized that the "professional expertise" of corrections officials will cause courts to give great weight to their testimony about proper state interests in jail operations. 441 U.S. at 540 n.23 (quoting *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974)). But when considering either legislative or executive action, if a court finds that the officer's asserted purpose is not a legitimate one, then the officer's good faith will not save him or her from liability.

2. *Bell* Creates An Objective Test For Whether Government Action Is "Reasonably Related" To A Permissible Goal Or "Excessive" In Relation To That Goal.

In determining whether a particular restriction on pretrial detainees is constitutional, *Bell* also stated that a restriction on detainees violates due process if it is not "rationally . . . connected" to the proposed purpose, or "whether it appears excessive in relation

to" that purpose. 441 U.S. at 538 (quoting *Mendoza-Martinez*, 372 U.S. at 168–69). Simply put, the Court considers whether a restriction is "reasonably related" to the proffered legitimate purpose. *Id.* at 539. This inquiry, like that into the legitimacy of a government purpose, is objective, as an examination of *Bell*'s analysis reveals.

For example, *Bell* notes that the Due Process Clause prohibits especially harsh practices that promote security or other legitimate objectives—such as "loading a detainee with chains and shackles and throwing him in a dungeon"—if the state's objectives can be attained through "many alternative and less harsh methods." 441 U.S. at 539 n.20. The comparison between the harshness of the state's practice and its alternatives is an inherently objective analysis, based on facts such as the precise restraints placed on the detainee and the available alternatives. *Bell* did not suggest that, in addition to examining these objective circumstances, a state officer's subjective motives are relevant to "excessiveness."

Similarly, in applying its standard to the specific restrictions before it, the Court found the practice of "double-bunking" at the Metropolitan Correctional Center in Manhattan to be permissible, without considering jail officials' subjective beliefs about the need for the policy. *Id.* at 541–43. Instead, the Court examined the circumstances such as the size of detainees' rooms and available amenities before concluding that the policy was reasonably related to the legitimate purpose of holding detainees for trial. *Id.*; see also *id.* at 561. The nature of the Court's analysis thus strongly suggests that state officers' subjective motivations for their actions are irrelevant to whether government treatment of detainees is "rationally

related" to its stated purpose or "excessive" in light of that purpose.

In other cases in which the asserted rights are based on the Due Process Clause, this Court has made clear that the "rationally related" and "excessiveness" tests are objective. See, *e.g.*, *Youngberg*, 457 U.S. at 316; *Ingraham*, 430 U.S. at 673–74. In *Youngberg*, for instance, this Court held that a state institution may not restrain a resident with an intellectual disability "except when and to the extent professional judgment deems this necessary" for safety purposes or to provide rehabilitative training. 457 U.S. at 324. In determining whether a particular restraint was reasonably related to these permissible purposes, the Court acknowledged the need for deference to professionals, but noted that a due process violation might occur if an official "actually did not base the decision" on "accepted professional judgment"—an objective standard. *Id.* at 323.

3. Under *Bell*'s Objective Test, An Objectively Unreasonable Use Of Force Against A Pretrial Detainee Violates The Due Process Clause.

Because, as shown above, the substantive due process test for analysis of a pretrial detainee's excessive force claim is an objective one, the well-developed and familiar Fourth Amendment formulation of objective "reasonableness" can be used.

Under *Bell*'s framework, cases will often turn on whether the state officers' use of force was excessive in relation to enforcement of jail security, including ensuring the safety of jail personnel, the detainee, and other inmates. Specifically, fact-finders will be asked to weigh the threat posed by detainees against the injury to the inmate that results from the force

actually used. See *Bell*, 441 U.S. at 539 n.20 (emphasizing a comparison between the restrictions actually imposed and the "alternative and less harsh methods" available).

This analysis dovetails with that required under the Fourth Amendment standard, which "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985)). Specific considerations in the Fourth Amendment context are the strength of the security interest, which include "whether the suspect poses an immediate threat to the safety of the officers or others" and "whether he is actively resisting." *Id.*; see also *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2021–22 (2014) (analyzing "grave public safety risk" posed by suspect). Against this interest is weighed the suspect's interest in bodily integrity, measured by the "extent of the intrusion" caused by the officer's use of force. *Garner*, 471 U.S. at 7–8; see also *Scott* v. *Harris*, 550 U.S. 372, 384 (2007) (weighing "the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing" a fleeing suspect). These are the same factors at issue in a due process excessive force case. A use of force that is not "necessary in a particular situation" under a Fourth Amendment test, *Graham*, 490 U.S. at 397, also is not "reasonably related" to security interests under the approach set forth in *Bell*.

The parallels between excessive force claims under the Due Process Clause and the Fourth Amendment also illustrate that an "objectively unreasonable" standard for pretrial detainees' claims will not have a deleterious effect on jail operations. Whether a jail

officer's use of force in a given situation is objectively reasonable will depend critically on the "facts and circumstances" at hand, in addition to the nature of the force itself. *Id.* at 396. The Fourth Amendment's objective standard is based on facts known at the time, not hindsight; it makes "allowance for the fact that police officers are often forced to make split-second judgments" in "tense, uncertain, and rapidly evolving" situations. *Id.* at 397.

Moreover, an "objectively unreasonable" standard has the advantage that it is already familiar to and utilized by many jails for the treatment of pretrial detainees. Jail officials are frequently trained not to use objectively unreasonable force in any situation. In Mr. Kingsley's case, for instance, the jail officers were guided by the *Principles of Subject Control* ("POSC"), a manual for jail and detention officers in Wisconsin produced by the Wisconsin Department of Justice. J.A. 242, see also J.A. 168; J.A. 218. The POSC manual instructs jail officers that "[y]ou may not know the custody status of the inmate with whom you are dealing, nor are you expected to use force differently depending on the custody status of an inmate. For these reasons, the training standard used in POSC is . . . the Fourth Amendment 'objective reasonableness' standard." J.A. 247–48.[7]

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[7] Officers in other jails are similarly trained to use only a reasonable amount of force. *See, e.g.*, Cook County Sheriff, Sheriff's Office Order No. 11.2.1.0, *Response to Resistance/Use of Force Policy* 1 (2011), *available at* http://www.csd700.com/uploads/1/6/8/9/16896754/general_orders__aug_13.pdf ("Officers shall use an amount of force reasonable and necessary based on the totality of the circumstances to perform a lawful task, effect an arrest, overcome resistance, control a subject, or protect the officer(s) or others from injury . . . .").

Of course, there are unique risks in a correctional environment, such as the presence of other inmates and the possibility of escapes, and therefore certain situations that arise in a jail setting may present legitimate reasons to use force. But when, taking all relevant facts into account and assessing the situation from the point of view of a reasonable officer in the circumstances, a jury nonetheless concludes that the state officers' use of force against a pretrial detainee was objectively unreasonable, there is no basis for a test that provides additional deference.[8]

II. THE FOURTH AMENDMENT FORBIDS STATE OFFICERS TO USE OBJECTIVELY UNREASONABLE FORCE AGAINST A PRETRIAL DETAINEE.

In *Graham*, this Court held that the Fourth Amendment's objective reasonableness standard governs claims based on the use of excessive force during arrest, but reserved "the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive force beyond the point at which the arrest ends and pretrial detention begins." 490 U.S. at 395 n.10. In this section, we show that the Fourth Amendment provides pretrial detainees with "protection against

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[8] In contrast, this Court's Eighth Amendment case law routinely requires that a state officer act with a particular intent such as malice in order to violate that Amendment's prohibition of cruel and unusual punishment. The Eighth Amendment applies only after a person has received the procedural protections guaranteed by the Due Process Clause, and it is "[t]he prisoner's conviction" which "entitles the State to classify him as a 'criminal,'" to prevent him from interacting with others in free society, and otherwise to punish him. *Ingraham*, 430 U.S. at 669 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972)).

the deliberate use of excessive force" throughout the period of pretrial detention.

A. The Guards' Use Of Force Against Mr. Kingsley Was A New Seizure.

"*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—*in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen* should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395 (second emphasis added). The Court determined that the Fourth Amendment "must be the guide for analyzing" such claims because it "provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct." *Id.*

This Court has also made clear that the Fourth Amendment continues to govern certain aspects of state officials' conduct with respect to a pretrial detainee even after an arrest has been completed. For example, *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), holds that "the Fourth Amendment requires a [prompt] judicial determination of probable cause as a prerequisite to extended restraint of liberty following [a warrantless] arrest." *Id.* at 114. See also *Cnty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 53 (1991) (describing *Gerstein*'s Fourth Amendment holding as presumptively requiring a hearing within 48 hours, a "'practical compromise' between the rights of individuals and the realities of law enforcement." (citation omitted)). On the other hand, as described in detail above, this Court has also applied the Due Process Clause in assessing the constitutionality of other aspects of the state's conduct towards pretrial detainees. See *Bell*, 441 U.S. at 520 (double-bunking and body-cavity searches following contact visits, *inter*

alia, do not deprive pretrial detainees of liberty under the Due Process Clause). For the reasons set forth below, this Court should hold that the Fourth Amendment establishes the standard governing the state's use of force against pretrial detainees.

Preliminarily, an individual who has not been convicted of any crime but who is detained by the state pending trial is subject to a continuing seizure and, as a result, the state's conduct toward such an individual should be evaluated for objective reasonableness under the Fourth Amendment. See *Albright* v. *Oliver*, 510 U.S. 266, 278–79 (1994) (Ginsburg, J., concurring) (noting that at common law "an arrested person's seizure was deemed to continue even after release from official custody" and that a person remains "'seized' for trial, so long as he is bound to appear in court and answer the state's charges"); *id.* at 307 (Stevens, J., dissenting) (agreeing with Justice Ginsburg's "explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable").[9] But this Court need not go so far as to hold that all pretrial detentions are continuing seizures. Instead, state officials' actions against a detainee that are "physically intrusive" such that they constitute a new seizure—that is, a seizure different from, or in addition to, the existing lawful detainment—are governed by the Fourth Amendment standard. Based on this Court's established definition of a "seizure," see *infra* p. 30, the use of objectively unreasonable force against a pretrial detainee will virtually always constitute such a new seizure within the meaning of the Fourth Amendment.

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[9] This Court has never specified the end-point of the Fourth Amendment seizure that begins with a person's arrest. *See infra* note 10.

This Court has "long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person." *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991). "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham*, 490 U.S. at 395 n.10 (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968)); see also *Terry*, 392 U.S. at 16 (a seizure ends when the restraint on the individual's "freedom to walk away" no longer exists); *Garner*, 471 U.S. at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person."); *Brower* v. *Cnty. of Inyo*, 489 U.S. 593, 597 (1989) (seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*"); *id.* at 596 ("Violation of the Fourth Amendment requires an intentional acquisition of physical control."). Pretrial detainees retain a liberty interest because they have not been convicted of any crime, see *Bell*, 441 U.S. at 545, and thus they can be "seized" within the meaning of the Fourth Amendment even when they have been lawfully detained.

A person may be lawfully detained even if arrested without a warrant so long as he or she receives a prompt judicial determination of probable cause.[10]

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[10] At the time the state used objectively unreasonable force against Mr. Kingsley, he had appeared at a bond hearing and an initial appearance but had not yet been arraigned or concluded his probable cause hearing. *See supra* note 1. It is clear that individuals who have been arrested and who are being held without a judicial determination that they are lawfully confined are entitled to Fourth Amendment protections under this Court's decisions in *Graham*, 490 U.S. at 386; *Gerstein*, 420 U.S.

And after that probable-cause determination, a person may be lawfully detained until trial. See *Gerstein*, 420 U.S. at 114. As noted, this continuing seizure of a pretrial detainee prior to conviction for any crimes supports application of the Fourth Amendment to state officers' use of unreasonable force against that detainee. See *supra* pp. 28–29. But, even assuming that the initial seizure of a person *ends*, either when the arrest is made or the judicial determination of probable cause occurs, a state officer's deliberate use of force against a lawfully detained person awaiting trial is a new "seizure" under the Fourth Amendment. That new seizure of a person lawfully in custody, but not convicted of any crime, is governed by the objective reasonableness standard of the Fourth Amendment.

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at 103; and *McLaughlin*, 500 U.S. at 44. *See supra* pp. 28–29. Indeed, the Ninth Circuit has explicitly extended the Fourth Amendment's protections against excessive force to "prolonged warrantless, post-arrest, pre-arraignment custody." *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996) ("We hold, therefore, that the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest."); *see also* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. Pa. L. Rev. 1009, 1041–45, 1061–66 (2013) (noting that the temporal scope of the Fourth Amendment has not been clearly defined and arguing that the Fourth Amendment should apply to conditions-of-confinement and excessive-force claims by arrestees until a probable cause determination or until arraignment). The end point for application of the Fourth Amendment standard to excessive force claims after arrest is unresolved. However, if this Court agrees that uses of objectively unreasonable force against pretrial detainees constitute new seizures and thus should be analyzed under the Fourth Amendment, this distinction among arrestees and pretrial detainees makes no legal difference in excessive force claims.

Mr. Kingsley's case provides a good illustration of this point. He had appeared before a judicial officer at the time of the incident; thus, he was being lawfully detained and awaiting trial. Put differently, the initial seizure of his person was arguably complete. Then, after he declined to remove a piece of paper from the light in his cell, he was subject to new physical restraints within his cell, by guards who held his arms, followed by handcuffing and then by tasing. See *supra* pp. 3–5. This physical intrusion and restraint is wholly distinct from the "seizure" that constituted Mr. Kingsley's warrantless arrest and detention pending arraignment and it therefore constitutes a new "seizure" within the meaning of the Fourth Amendment, to which the objective reasonableness test should apply.

There is nothing anomalous about concluding that Mr. Kingsley was subject to a seizure while already lawfully detained and incarcerated (*i.e.*, already seized). For example, this Court has previously distinguished routine incarceration from custody for purposes of an interrogation requiring *Miranda* warnings. In *Maryland* v. *Shatzer*, 559 U.S. 98, 108–09 (2010), this Court found that a prisoner's return to the general prison population after invoking his right to counsel constituted a break in *Miranda* custody for purposes of custodial interrogation. See also *Howes* v. *Fields*, 132 S. Ct. 1181, 1190–91 (2012) (service of a prison term is not enough to constitute *Miranda* custody). Here, the fact that Mr. Kingsley had been seized when arrested did not preclude him from being subjected to a second physical intrusion or seizure when the guards used force against him in the receiving cell.

As noted above, this Court has already applied the Fourth Amendment to state conduct with respect to

pretrial detainees *who have not yet been arraigned* by requiring a prompt probable-cause inquiry after a warrantless arrest. See *supra* p. 28–29 (discussing *Gerstein* and *Riverside*). And the Court has applied the Due Process Clause to pretrial detainees' conditions of confinement presumably *after those detainees had been arraigned* and received a probable-cause determination. See *supra* pp. 17–19 (discussing *Bell*). However, it is illogical to draw the line between application to pretrial detainees of the Fourth Amendment, on the one hand, and the Due Process Clause, on the other, at the probable-cause hearing or arraignment. That inquiry focuses on justification for a warrantless arrest. The existence of probable cause for an arrest renders a person's continued detention lawful. Thus, it may mark the end of the initial seizure of that person and have some effect on this Court's assessment of the constitutionality of his conditions of confinement, as it did in *Bell*. But the existence of probable cause for arrest is *not* relevant to assessment of the appropriate conduct for a state officer during his or her physical interactions with detainees who have not yet been convicted of any crime. Whenever a deliberate seizure of a person not yet convicted of a crime occurs, it should be governed by the Fourth Amendment.

Applying the Fourth Amendment to all seizures of pretrial detainees has the additional virtue of limiting the scope of the substantive Due Process Clause in assessing the constitutionality of the conduct of state actors. In *Albright*, this Court reinforced its "reluctan[ce] to expand the concept of substantive due process, because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." 510 U.S. at 271–72 (quoting *Collins* v. *Harker Heights*, 503 U.S. 115, 125 (1992)).

There is no need to expand substantive due process to state officers' deliberate use of force against pretrial detainees when the Fourth Amendment standards are so well known and offer the perfect balance of the important interests at stake.

Finally, the Fourth Amendment test proposed here is in accord with the Court's statement in *Graham* that in most instances, the constitutional right implicated in an excessive force case will either be the Fourth Amendment or the Eighth Amendment. *Graham,* 490 U.S. at 394. A pretrial detainee's status is much closer to that of an arrestee than a convicted prisoner, in that only in the case of the convicted prisoner have the procedural protections of the Fifth and Fourteenth Amendments been afforded as prerequisite to the imposition of criminal punishment. Thus, the Fourth Amendment, and its objective standard, is the proper framework for analysis of excessive force claims of pretrial detainees. In contrast, the Eighth Amendment, which, among other things, takes into account the subjective intent of the officer, is an inappropriate framework.

B. The Fourth Amendment's Test Appropriately Balances The Important Individual And State Interests At Stake.

As discussed above, applying an objective reasonableness standard to claims that state officers have used excessive force against pretrial detainees will appropriately balance the relevant constitutional interests at stake. The Fourth Amendment's objective reasonableness test with respect to the use of force has been fully developed by this Court in the context of state officers' use of force *to make an arrest.* There, this Court has explained that the reasonableness of the officers' application of force is context and fact specific. *Graham*, 490 U.S. at 396 (citing *Garner*, 471

U.S. at 8–9 (question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure")). Moreover, "[t]he 'reasonableness'" inquiry in an excessive force case is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 390 U.S. at 396 (citing *Terry*, 392 U.S. at 20–22):

> With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Graham, 390 U.S. at 396–97 (quoting *Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). Notably, "an officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham*, 390 U.S. at 397 (citing *Scott* v. *United States*, 436 U.S. 128, 138 (1978)).

Just as state officers have the right to use reasonable force or physical coercion or the threat of either to effectuate a lawful warrantless arrest, they also have the right to use such force to maintain order and safety in a detention facility. Critically, however, in both circumstances, state officials are dealing with persons not yet convicted of any crime. That is, the state has not yet "'complied with the constitutional guarantees traditionally associated with criminal

prosecutions,'" when it uses force against either a person lawfully subject to warrantless arrest or a person lawfully subject to pretrial detention. See *Graham*, 390 U.S. at 398 (quoting *Ingraham*, 430 U.S. at 671 n.40). In both settings, the objective reasonableness test provides state officers with substantial leeway since all actions are viewed through the lens of a reasonable officer under all the circumstances presented and second-guessing and hindsight are forbidden. This test represents the appropriate balance of the interests at stake when the state uses force against an individual not convicted of a crime. See also *Garner*, 471 U.S. at 8–9.[11]

In sum, the established Fourth Amendment test of objective reasonableness should apply when a pretrial detainee is subjected to a new seizure in the form of objectively unreasonable physical force while being confined and awaiting trial.

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[11] As explained above, this test will not undermine jail security or other legitimate state interests in prison or jail administration. And it is both familiar and administrable, as its long use demonstrates. *See supra* pp. 26–27.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. §1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

PARTIES TO THE PROCEEDING

Petitioner is Michael B. Kingsley, appellant below and plaintiff in the district court.

Respondents are Stan Hendrickson and Fritz Degner, appellees below and defendants in the district court.

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INTRODUCTION

This Court has long recognized that the fact of incarceration fundamentally changes the constitutional analysis of a detainee's rights. While a detainee does not shed his constitutional protections at the jailhouse door, many of the constitutional rights enjoyed by free individuals are either incompatible with jail life or must be substantially modified to account for the realities of incarceration. What is more, this Court has recognized that corrections officials have unique expertise and need special protections given their constant interaction with dangerous individuals who by dint of their incarceration have substantial time to contemplate potential litigation. And while the fact of incarceration fundamentally changes the constitutional analysis, the detention status—pretrial versus post-conviction—is far less consequential. This Court has recognized that pretrial detainees can be every bit as dangerous as post-conviction detainees and has routinely applied similar tests to pretrial and post-conviction detainees.

Despite all this, petitioner insists that the Fourth Amendment standard for excessive force claims by free individuals should apply to pretrial detainees, either directly or via the Due Process Clause. But that approach ignores the degree to which the fact of incarceration fundamentally changes the constitutional analysis. It also guarantees that virtually every complaint of excessive force by a pretrial detainee will necessitate a jury trial.

This Court's precedents provide a clear and superior path for resolving this case. This Court has

already made clear that the Due Process Clause, and not the Fourth Amendment, provides the proper framework for addressing excessive force claims brought by pretrial detainees. This Court has likewise held that what the Due Process Clause forbids is punishment, and that punishment has a subjective component. And this Court has already determined the requisite intent that renders the use of excessive force on a detainee unconstitutional. While the Court articulated that test while addressing an Eighth Amendment claim brought by a post-conviction detainee, the test is fully applicable to a due process claim brought by a pretrial detainee. Indeed, the Court's test for excessive force in the incarceration context was expressly based on a test articulated by Judge Friendly in addressing a due process claim by a pretrial detainee.

What Judge Friendly recognized four decades ago remains equally true today: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973). Judge Friendly understood that the Fourth Amendment excessive force standard applicable to free individuals was misplaced in the incarceration context, where a few guards are constantly interacting with numerous detainees who, whether being held pretrial or post-conviction, are "not usually the most gentle or tractable of men and women." *Id.* The test applied by this Court to the excessive force claims of incarcerated individuals fully accounts for that reality and should govern petitioner's claim. The instructions below were, if

anything, overly protective of petitioner's rights, and yet the jury rejected petitioner's claim after a full jury trial. There is no basis for disturbing that judgment.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Michael B. Kingsley was arrested for felony possession of cocaine with intent to manufacture, distribute, or deliver in April 2010 and convicted of that crime in October 2011. JA103.[1] Reflecting the seriousness of his crime, petitioner was required to post a bond, which he failed to do before the events in question. While awaiting trial for what would be his sixth felony conviction in less than 10 years, *id.*, petitioner was incarcerated at the Monroe County Jail in Sparta, Wisconsin. JA126. Like all facilities of its kind in Wisconsin—and, indeed, most such facilities throughout the Nation—the Monroe County Jail houses individuals like petitioner who are detained pending trial, as well as individuals who have been convicted of crimes. And like most jails, the pretrial detainees in the Monroe County Jail are often accused of far more serious crimes than the post-conviction detainees. By law, individuals convicted of crimes that result in sentences of greater than one year do not serve their sentences in the Monroe County Jail, but individuals accused of much more serious offenses are detained there pending trial. Wis. Stat. §§973.02 & 302.31.

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[1] *See also* Court Record Events, *State v. Kingsley*, Monroe Cnty. Case No. 2010CF000134, Wis. Ct. System Cir. Ct. Access, http://perma.cc/6tv8-6edq.

At 10:30 p.m. on May 20, 2010—30 days into petitioner's pretrial detention and after three separate appearances by petitioner before a Wisconsin judge—Monroe County Deputy Sheriff Nicholas Manka was conducting cell checks in the Jail when he noticed that a piece of paper was covering the overheard light in petitioner's cell. JA42. Manka directed petitioner to remove the paper from the light because the paper made it difficult to see into petitioner's cell and created a potential fire hazard. JA44; JA127; R157, pp. 130-31. Petitioner twice refused to remove the paper, sarcastically telling Manka that he better call in an emergency response team to remove it. JA127.

At the shift change the next morning, Manka told Monroe County Deputy Sheriff Karl Blanton about petitioner's refusal to remove the paper covering the light in his cell. R158, pp. 53-54. Blanton asked petitioner to remove the paper, and, for the third time, petitioner failed to comply. *Id.* Blanton made several follow-up requests, which petitioner also rebuffed. *Id.*

Then Sergeant—now Lieutenant—Stan Hendrickson learned of petitioner's intransigence and asked him to remove the paper from the light. JA181. As even petitioner concedes, Hendrickson told him: "It's a direct order. I'm telling you to take the paper off the light." JA128; R155, p. 20. Consistent with his responses to Manka and Blanton, petitioner refused. *Id.*

Hendrickson reported petitioner's refusals to Robert Conroy, who was the Monroe County Jail Administrator at the time. R157, pp. 88-90. When Conroy arrived at the jail later that morning, he too attempted to get petitioner to remove the paper from

the light. Conroy's efforts proved equally unsuccessful. JA129.

Recognizing that the only way that full visibility into petitioner's cell would be restored and the potential fire hazard eliminated would be to remove the paper themselves, the jail officials decided to do just that. Conroy informed petitioner that jail staff would remove the paper from the light, but he explained that petitioner would first need to be moved to a separate "receiving" cell. R157, pp. 47, 91. Specifically, Conroy told petitioner that the transfer was necessary to permit jail staff to enter the cell safely and remove the paper and was also appropriate as a disciplinary measure for his recalcitrance. R154, pp. 8-10. Nothing if not consistent, petitioner reported that he would not cooperate with jail officials' efforts to remove the paper or remove him from the cell. R154, p. 8.

Jail officials, including Conroy, Blanton, Hendrickson, Deputy Sheriff Fritz Degner, and Deputy Sheriff James Shisler, then met to discuss how to transfer petitioner safely to the receiving cell. Those jail officials had decades of incarceration-related experience and training. Degner has been a deputy sheriff in Monroe County since July 1992 and a law enforcement officer for more than 30 years, JA196-97, and Hendrickson has worked at the Jail since August 2000, JA181. Degner and Hendrickson both hold professional certifications issued by the State of Wisconsin, Degner as a law enforcement officer and Hendrickson as a jail officer, and both are trained to deal with situations like the one created by petitioner. R155, pp. 16, 63.

Drawing on that knowledge and experience, and consistent with their training, the jail officials decided that the best course of action for all involved was to have Hendrickson return to petitioner's cell with Blanton, where they would handcuff petitioner for transfer. R157, p. 93. Degner would stand by with an electronic control device (more commonly known as a Taser) as a precaution, and Conroy and Shisler would assist as needed. *Id.*

The officials went to petitioner's cell to execute their plan. Hendrickson ordered petitioner to stand up and turn his back to the cell door so that he could be handcuffed. JA290; R157, pp. 63, 66. Petitioner failed to comply and continued lying face down on his bunk. JA291. He would later testify at trial that he was afraid to move because Degner was pointing a Taser at him, but a video recording of the cell transfer confirmed that Degner had done no such thing. R154, pp. 13-15; R155, p. 67; R157, pp. 65-66; R148, Ex. 13. When petitioner refused to stand up, Conroy told him to put his hands behind his back. Petitioner put his hands along the sides of his body, and the officers entered the cell. R157, p. 95; R158, pp. 59-60.

Hendrickson and Blanton attempted to handcuff petitioner while he lay face down on his bunk. R157, p. 96. Petitioner resisted, tensing and moving his arms, preventing Hendrickson from handcuffing him. R155, pp. 25-26; R157, p. 68. Blanton assisted Hendrickson in getting control of petitioner's arms so that he could be handcuffed. R158, p. 61; R155, p. 26. Hendrickson double locked the handcuffs, which prevented them from tightening once they were on,

and checked them to make sure they were not too tight. R154, p. 22; R155, p. 28; R154, p. 120.

Once petitioner was handcuffed, Hendrickson and Blanton helped him into a sitting position on his bunk and tried to assist him up. R155, p. 26; R158, p. 64. Petitioner was given the option to walk out of his cell, but he refused, claiming that his foot hurt. R155, p. 26; R158, pp. 64-65. Petitioner refused to respond to questions regarding the alleged injury to his foot. He also refused to walk. R154, pp. 16-19; R155, pp. 26-27; R158, pp. 64-65. Before he was removed from his cell, petitioner was warned that if he resisted the officers, the use of the Taser might be necessary. He responded by stating that he "would sue" if a Taser were used. R155, p. 68.

Faced with petitioner's persistent obstinance, Hendrickson and Blanton were forced to carry petitioner out of his cell. Once petitioner was removed from the cell, the officials laid him face down in the main hallway of the Jail and inquired after the status of his foot. R155, pp. 27-29; R158, pp. 65-67; R149, Ex. 520; R155, pp. 65, 70-71. Petitioner responded with only silence, so the officers carried him to the receiving cell. R155, p. 29; R158, p. 67; R149, Ex. 520, R155, pp. 65, 70-71.

The officials attempted to remove petitioner's handcuffs once he was safely inside the receiving cell. JA173-74; R154, p. 23; R157, p. 76. Blanton first attempted to remove the handcuffs, and petitioner refused to cooperate, pulling his arms apart, moving his hands, lifting his torso, and tensing his arms. JA174-76, 185. Petitioner later admitted that he was tensing his body and flexing his arms, that he was

"quite belligerent," and that, as a result, the officers were having difficulty removing the handcuffs. R157, pp. 72, 77-78.

Despite the officials' repeated instructions to calm down and to stop resisting their efforts, petitioner continued resisting and struggling, even growling aggressively. JA176-77; R154, pp. 24-25; R155, pp. 32-33. Under the best of circumstances, it can be difficult to remove handcuffs because of the small key hole; when a subject is moving around and otherwise resisting efforts to remove handcuffs, the task is more difficult still. JA185, 223; R154, p. 116. As the officials struggled to remove the handcuffs, petitioner offered some expletive-laced imperatives to "get ... off" and "get ... out." R154, p. 25; R155, pp. 33-34.

The officials persisted in attempting to remove the handcuffs, largely for petitioner's own safety. JA183; JA178; R154, p. 23. The receiving cells in the Jail are small concrete and cinder block cells containing only a concrete bunk with a raised metal lip and a sink and toilet encased in concrete. R154, pp. 26-28; R149, Ex. 509 B. There is a risk that an individual left alone in such a cell with his hands cuffed behind his back could fall and be injured. R154, p. 123. As a rule, officers in the Jail do their utmost to avoid leaving inmates in the receiving cells alone while handcuffed. R154, pp. 23-24. The officials were also concerned that petitioner could escalate the situation and begin actively fighting them. JA176-77, 189; JA200-01; R154, pp. 25-26.

At that point, faced with the facts on the ground as he perceived them in the moment, and consistent with his training, Hendrickson believed that all

suitable or reasonable alternatives had been exhausted, and he instructed Degner to apply a contact stun to petitioner with his Taser. JA188-92. Hendrickson hoped that the single brief use of the Taser would gain petitioner's compliance and, in turn, allow the officers to remove the handcuffs and exit the receiving cell safely. JA191-92. Following Hendrickson's order, Degner applied a five second contact stun to the back of petitioner's right shoulder. JA202-03.[2]

Petitioner was undeterred by the use of the Taser and continued struggling against the officials, who were still unable to remove the handcuffs. JA203; JA178; JA191-93. Conroy ordered the officers out of the cell and continued to monitor petitioner via a closed circuit camera. JA193; JA178-79; JA203; R154, p. 31-33. Conroy and three other officers re-entered the cell twelve minutes later to renew the effort to remove petitioner's handcuffs. R154, pp. 32-33. Although petitioner again resisted, Conroy's efforts were ultimately successful, and the handcuffs were removed. R154, pp. 33-34.

Conroy placed petitioner on medical watch, and a nurse visited petitioner in his cell. JA46; R154, pp. 34-35; R149, Ex. 513; R.149, Ex. 512. Petitioner refused to see the nurse and never sought medical attention as a result of the incident. R157, p. 86.

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[2] The use of a Taser in contact stun mode, although painful, does not result in neuromuscular incapacitation or injury. JA224-25; R154, pp. 67-68.

B. Procedural History

True to his word, petitioner filed suit *pro se* against several Monroe County Jail officials under 42 U.S.C. §1983 alleging that they had used unconstitutionally excessive force and deprived him of due process. JA292. The district court screened petitioner's complaint and, as relevant here, allowed petitioner to proceed with excessive force claims against Blanton, Conroy, Degner, and Hendrickson.

The jail officials moved for summary judgment, contending that their actions did not constitute excessive force as a matter of law and that, in the alternative, they were entitled to qualified immunity. JA48. The district court denied the motion. The district court held that "a reasonable jury could conclude that" the force used was excessive and that the officials "acted with malice and intended to harm plaintiff when they used force against him." JA53-54. The district court denied the officials qualified immunity for the same reasons. JA54.

After substantial discovery, which followed the appointment of counsel for petitioner by the district court, and after Conroy and Blanton were voluntarily dismissed from the suit, the trial on petitioner's excessive force claims against Hendrickson and Degner commenced. R77; R127; R131. That trial lasted three days—from October 15 to October 17, 2012—and involved the testimony of all but one of the jail officials who played a part in transferring petitioner between cells, as well as expert testimony. In addition to recounting the relevant facts in detail, the officers explained that their conduct was entirely consistent with their extensive training and the

guidelines promulgated by the State of Wisconsin governing the use of a Taser. Those guidelines provide that use of a Taser is appropriate to overcome active resistance, or the threat of such resistance, by a prisoner, where active resistance is defined as a prisoner's efforts to physically counteract a jail official's control efforts under circumstances in which the behavior itself, the environment in which the behavior occurs, or other factors create a risk of bodily harm. JA218-21; R149, Ex. 517; JA261-69; JA168-69. John Peters, a national expert in the use of force by law enforcement officers, testified that the use of a Taser in contact stun mode—the mode used here—was reasonable based on petitioner's conduct. JA207-16; JA224-25.

Before the matter was sent to the jury, the parties submitted competing instructions on the contours of petitioner's excessive force claim. Petitioner sought an instruction based on the Fourth Amendment excessive force standard used for claims by free individuals, while respondents sought an instruction used for excessive force claims by detainees incarcerated after conviction. The district court opted for a middle ground and instructed the jury, in relevant part, as follows:

> Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused some harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and

- Any efforts made by defendants to limit the amount of force used.

A person can be harmed even if he did not suffer a severe injury.

JA277-78.

The jury returned a verdict in favor of Hendrickson and Degner, and the district court entered a final judgment dismissing the case. JA284-87.

Petitioner appealed to the U.S. Court of Appeals for the Seventh Circuit, arguing, as relevant here, that the jury was erroneously instructed on his excessive force claim. Petitioner contended "that the district court conflated the standards for excessive force under the Eighth and Fourteenth Amendments, and, as a result, wrongly instructed the jury to consider the subjective intent" of the jail officials. JA289. In their briefing before the Seventh Circuit, Hendrickson and Degner argued that, if anything, the instruction was insufficiently demanding when it came to intent, that the judgment should be affirmed, and that, in the alternative, the officers were entitled to qualified immunity. CA7 Appellee Br. 23-28.

The Seventh Circuit affirmed on the merits, holding "that the instructions were not an erroneous or confusing statement of the law of th[e] circuit." JA289. Writing for the majority, Judge Ripple explained that Seventh Circuit precedents "recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind" when evaluating a pretrial detainee's excessive force claim. JA303. Judge Ripple also noted that "the requisite state of mind" is "at least recklessness." *Id.*; *see* JA307 ("our cases are clear that

the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases"). Judge Hamilton dissented and argued that a pretrial detainee need only "prove that a correctional officer used objectively unreasonable force" in order to prevail on an excessive force claim. JA311.

The Seventh Circuit denied petitioner's request for rehearing and rehearing en banc. JA334-35.[3]

SUMMARY OF ARGUMENT

This Court has repeatedly recognized that the fact of incarceration fundamentally changes the constitutional analysis. The constitutional rights enjoyed by free individuals are either wholly inapplicable in the incarceration setting or must be substantially modified to reflect the realities of incarceration. Importantly, this Court has expressly recognized that while the fact of incarceration is a game-changer, the detainee's precise status as a pretrial or post-conviction detainee is not. The fact and realities of incarceration are the same for both kinds of criminal detainees, and in practice many pretrial detainees may be more dangerous than post-conviction detainees, particularly at a local jail like that at issue here. *See Bell v. Wolfish*, 441 U.S. 520, 546 n.28 (1979). This Court has likewise emphasized the importance of judicial deference to the difficult

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[3] During the course of these proceedings, petitioner filed another lawsuit against a Monroe County Jail deputy alleging excessive force. That case was tried to a jury on December 8, 2014, and the jury returned a verdict in favor of the deputy and against petitioner. *See Kingsley v. Raddatz*, No. 13-cv-432-bbc (W.D. Wis.).

decisions routinely made by corrections officials and has expressly held that the need for deference does not turn on the "happenstance" of whether the plaintiff is a pretrial or post-trial detainee. *Id.* at 547 n.29.

This Court's precedents provide a clear path for resolving the question presented here. This Court has already made clear that the Due Process Clause governs the claims of pretrial detainees, and what the Due Process Clause forbids is punishment. This Court has made equally clear that punishment necessarily requires a subjective intent to punish. Finally, this Court has specified the requisite subjective intent to punish in the precise context of excessive force claims in the incarceration setting. A detainee must demonstrate that force was used maliciously and sadistically for the very purpose of causing harm. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320-22 (1986). To be sure, both *Whitley* and *Hudson* involved claims by post-conviction detainees, but that makes no difference. Not only has the Court generally treated the claims of pretrial and post-conviction detainees as interchangeable, but the Court "derived" the *Whitley-Hudson* standard from a seminal opinion of Judge Friendly resolving the due process claims of a pretrial detainee. At a bare minimum, the Due Process Clause would require a subjective intent akin to recklessness, and the jury here was instructed based on a recklessness standard and returned a verdict in favor of respondents.

Rather than adopt a standard derived from due process and tailor-made to excessive force claims in the incarceration context, petitioner urges this Court

to adopt a purely objective standard based on the Fourth Amendment principles that govern excessive force claims by free individuals. But any direct application of Fourth Amendment principles would be a non-starter, as it would ignore the reality that the fact of incarceration fundamentally changes the requisite constitutional analysis. Moreover, to the extent that the Fourth Amendment standard must be modified to take into account the realities of prison life, petitioner's approach makes little practical or doctrinal sense. Practically, if the Fourth Amendment standard must be substantially modified for the incarceration context, there is little justification for ignoring the *Whitley-Hudson* test which is already perfectly suited for the incarceration setting. Doctrinally, there is a fundamental misfit between the objective reasonableness test, which is properly the focus of the Fourth Amendment when it comes to the claims of free individuals, and the due process inquiry. A host of statutes, regulations and training manuals address the appropriate use of force by corrections officials, but not every unreasonable search or seizure constitutes punishment, and the Due Process Clause prohibits only the latter. Indeed, this Court has expressly rejected a negligence standard as misplaced in the due process context, and petitioner's argument would render any unreasonable or undue use of force a due process violation.

Petitioner and the government attempt to read a purely objective test into this Court's decision in *Bell*, but *Bell* holds just the opposite. Punishment is the *sine qua non* of a due process violation, and the effort to divide punishment from a use of force that appears unnecessary in hindsight when considered in the calm

of the courtroom requires a subjective inquiry. Petitioner's last ditch effort to view every use of force against a detainee as a continuing or new seizure that must be tested for reasonableness is even more inconsistent with this Court's precedent. It would also work a revolution in prisoner litigation, as there is no logical reason the analysis would be limited to pretrial detainees.

Finally, even if this Court rejects the approach of the majority of the Circuits, including the Seventh Circuit, and adopts a purely objective test, it should nonetheless affirm for two independent reasons. First, such a decision would make qualified immunity for respondents clearly appropriate. There is no question that the Seventh Circuit required the plaintiff to show at least recklessness, and a jury instructed consistent with Seventh Circuit precedent rejected petitioner's claims. This Court is free to reject the Seventh Circuit's analysis on the merits, but in doing so the Court would only underscore that respondents did not violate clearly established law. To the contrary, their actions were fully consistent with governing Circuit precedent, which is enough to provide them qualified immunity and spare them a second trial. Second, as the government argues, another trial is unnecessary because proper respect for the province of the jury would allow the instructions here to be read consistent with the government's conception of an objective reasonableness test.

ARGUMENT

I. The Fact Of Incarceration Profoundly Affects The Analysis Of Constitutional Claims Brought By Incarcerated Criminal Detainees.

This Court has long recognized that the fact of incarceration fundamentally affects the constitutional rights of incarcerated individuals relative to those enjoyed by individuals at liberty. While "[t]here is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974), the constitutional rights of inmates are "subject to restrictions and limitations" that make the contours of those rights quite unlike the rights of free individuals. *Bell*, 441 U.S. at 545. The fundamental difference in constitutional rights based on one's incarceration is a result of the fact that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Wolff*, 418 U.S. at 555 ("Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen").

This basic principle provides the foundation for this Court's cases involving the constitutional rights of incarcerated individuals. For example, in *Pell v. Procunier*, 417 U.S. 817, 822 (1974), "start[ing] with the familiar proposition that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,'" this Court held that a ban on inmate media interviews did not run afoul of the First Amendment. Rather than applying the

typical First Amendment analysis applied to claims by individuals at liberty, the Court identified the ban as being "peculiarly within the province and professional expertise of corrections officials," noted that "courts should ordinarily defer to the[] expert judgment" of prison officials in such matters, and held that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response," the ban must be upheld. *Id.* at 827.

Just three years later in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977), the Court once again relied on the premise that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights." Based on that premise, the Court upheld prison regulations prohibiting meetings of a prisoners' labor union, inmate solicitation of other inmates to join the union, and mailings concerning the union from outside the prison against First and Fourteenth Amendment challenges. The Court held that those restrictions "barely implicated" inmates' constitutional rights and were "rationally related to the reasonable, indeed to the central, objectives of prison administration." *Id.* at 129-30.

The Court formalized its analysis of constitutional claims by incarcerated individuals in its seminal opinion in *Turner v. Safley*, 482 U.S. 78 (1987). The Court definitively rejected the notion that constitutional claims by incarcerated individuals should be subjected to the same levels of scrutiny typically applied to constitutional claims of free citizens. Instead, the Court adopted a much less demanding standard that gives substantial deference

to the judgments made by prison officials. The Court emphasized the limitations on judicial inquiries into matters of prison administration and recognized that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85. Of course, the Court's more relaxed scrutiny of constitutional claims in the incarceration context does not leave detainees' rights unprotected. In *Turner* itself, the Court rejected Missouri's limitations on prisoner marriages, while upholding the restrictions on correspondence. But *Turner* makes clear that the constitutional norms that govern outside prison walls do not readily translate to the claims of detainees and underscores the need for deference to the often difficult judgment calls made by corrections officials.

While the fact of incarceration is a game-changer that fundamentally affects the nature of the constitutional analysis, the precise nature of the detention—pretrial versus post-conviction—is far less relevant. When *Turner* synthesized the Court's previous cases involving constitutional claims of detainees, it drew no distinction between cases like *Pell* and *Jones* involving post-conviction detainees and cases like *Bell* involving pretrial detainees. *Id.* at 86-87.[4] More to the point, in *Bell* this Court expressly

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[4] *Turner* is hardly idiosyncratic in this respect. This Court has routinely relied on post-conviction cases in cases involving pretrial detainees, *see, e.g., Bell* and *Block*, and vice-versa, *see, e.g., Hudson* and *Whitley*. Lower courts, moreover, have routinely invoked *Turner* in cases involving pretrial detainees.

stated that the "principle" that confinement constricts an inmate's constitutional rights "applies equally to pretrial detainees and convicted prisoners." *Bell*, 441 U.S. at 546. "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* A pretrial "detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Id.*; *see id.* at 554 (The constitutional "rights of prisoners and pretrial detainees are ... subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution."). The fact that pretrial detainees are afforded a presumption of innocence in the criminal proceedings still pending against them does not alter this analysis. *Id.* at 533 (the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun").

The Court is not alone in its recognition that the fact of incarceration (and not the precise detention status) is the critical dividing line, as demonstrated by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. §1997e. The PLRA acknowledges that incarcerated individuals, unlike individuals at liberty, are in near constant contact with state actors and because of their incarceration have ample time to contemplate potential litigation against those state actors. The PLRA thus includes numerous features designed to deter frivolous litigation against prison officials. *See,*

See, e.g., *Ortiz v. Downey*, 561 F.3d 664 (7th Cir. 2009); *Bull v. City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010).

e.g., §1997e(a) (requiring exhaustion of administrative remedies); §1997e(c)(1) (allowing the court to *sua sponte* dismiss "frivolous" claims). Importantly, Congress made the PLRA applicable to anyone "confined in any jail, prison, or other correctional facility;" thus, its provisions are equally applicable to both pretrial and post-conviction detainees. 42 U.S.C. §1997e(a); *see, e.g.*, *Inmates of Suffolk Cnty. Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997); *Johnston v. Maha*, 460 F App'x 11 (2d Cir. 2012); *Bonner v. Alford*, 2015 WL 774738 (5th Cir. 2015); *Graves v. Arpaio*, 623 F.3d 1043 (9th Cir. 2010); *Peoples v. Gilman*, 109 F. App'x 381 (10th Cir. 2004); *Goebert v. Lee Cnty.*, 510 F.3d 1312 (11th Cir. 2007) (all applying the PLRA to pretrial detainees).

Because the rights of pretrial detainees—like other incarcerated individuals—are not the same as those of individuals at liberty, this Court has rejected the constitutional claims of pretrial detainees while emphasizing the need for deference to the difficult judgments made by prison officials. In *Bell*, for example, this Court rejected a number of constitutional claims of pretrial detainees that surely would have succeeded if subjected to the constitutional analysis that governs comparable claims by free individuals. Thus, a ban on most hardback books, an obvious First Amendment violation in most contexts, was upheld as "a rational response by prison officials to an obvious security problem." 441 U.S. at 550. A restriction on most packages from outside the jail was upheld against Fifth Amendment challenge as a "reasonable limitation" "in light of the legitimate security concerns of the institution." *Id.* at 554. Likewise, while reserving the question whether

Fourth Amendment privacy interests even applied in the incarceration context, the Court upheld unannounced cell searches and visual body cavity searches. *Id.* at 558. And the Court rejected the notion that any of these policies amounted to unconstitutional punishment in contravention of the Due Process Clause.[5]

Underlying this Court's unbroken line of cases recognizing that the fact of incarceration fundamentally changes the constitutional analysis is the need for deference to the difficult choices that corrections officials must make on a daily basis. The Court's position on the issue is crystal clear: those officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547 (citing *Jones*, 433 U.S. at 128; *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Meachum v. Fano*, 427 U.S. 215, 228 (1976)); *see Pell*, 417 U.S. at 827 ("Such considerations are peculiarly within the province and professional expertise of corrections officials, and ... courts should ordinarily defer to their expert judgment in such matters."). That deference is comprehensive, covering actions "taken in response to an actual confrontation with" inmates, "just as it does to prophylactic or preventive measures intended to reduce the incidence of these or

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[5] Similarly, this Court upheld a "blanket prohibition" on contact visits as applied to pretrial detainees against a due process challenge in *Block v. Rutherford*, 468 U.S. 576, 588 (1984).

any other breaches of prison discipline." *Whitley*, 475 U.S. at 322.

Lest there be any doubt, this deference is fully applicable to jail officials dealing with pretrial detainees as opposed to post-conviction detainees. In *Bell*, this Court expressly and emphatically rejected the argument that corrections officials should get less deference in pretrial detainee cases than in post-conviction detainee cases. 441 U.S. at 547 n.29. The Court emphasized that deference was appropriate because "the realities of running a corrections institution are complex and difficult" and "courts are ill equipped to deal with these problems." *Id.* None of that depends on whether the particular detainees are being held for trial or after their convictions, and thus the need for deference does not turn "on that happenstance." *Id.*

II. A Pretrial Detainee's Claim Of Unconstitutionally Excessive Force Requires Proof Of A Subjective Intent To Punish.

A. This Court Has Made Clear That What Due Process Proscribes Is Punishment, and That Punishment Requires Intent.

The Due Process Clause governs an excessive force claim by a pretrial detainee, and this Court's precedents clearly establish that what "[d]ue process requires" is "that a pretrial detainee not be punished." *Bell*, 441 U.S. at 535. *Accord Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) ("the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment"); *Bell*, 441 U.S. at 535 (a pretrial "detainee may not be punished prior to

an adjudication of guilt in accordance with due process of law."). Thus, "the dispositive inquiry is whether the challenged condition, practice or policy constitutes punishment." *Block*, 468 U.S. at 583.

This Court's precedents make equally clear that "punishment" within the meaning of the Due Process Clause requires a subjective intent to punish. In *Bell*, for example, the Court explained that courts faced with claims of misconduct by prison officials must assess whether "the disability is imposed for the *purpose of punishment* or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538 (emphasis added). In other words, to prove punishment in violation of due process, a detainee must make "a showing of an expressed intent to punish" or establish that such intent may be inferred because the action in question is not "reasonably related to a legitimate government objective." *Id.* at 538-39; *id.* at 539 n.20 ("in the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective" (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960))).

"Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Bell*, 441 U.S. at 537. Punishment requires intent. "'The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word [punishment] means today; it is what it meant in the eighteenth century

... '" *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.), *cert. denied*, 479 U.S. 816 (1986)). Put simply, "some mental element must be attributed to the inflicting" jail official before his or her conduct "can qualify" as "punishment." *Id.* *See also Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (reasoning that "a subjective approach isolates those who inflict punishment").

B. The Proper Subjective Intent Inquiry for Pretrial Detainee Excessive Force Claims Is the One Identified in *Hudson* and *Whitley*.

This Court's precedents not only make clear that the Due Process Clause forbids punishment and that punishment requires intent, they also identify the requisite intent for a claim of unconstitutionally excessive force in the incarceration context. This Court has considered excessive force claims by incarcerated individuals and the distinctive features of such claims relative to claims based on general prison policies or conditions, in cases like *Hudson v. McMillian*, 503 U.S. 1 (1992), and *Whitley v. Albers*, 475 U.S. 312 (1986). *Hudson* and *Whitley* recognize that corrections officials will inevitably need to use force in furtherance of legitimate penological interests such as maintaining discipline and restoring order. *See Hudson*, 503 U.S. at 6; *Whitley*, 475 U.S. at 321-22. Those decisions also recognize the need for deference to prison officials and the limitations on the judicial role, such that difficult decisions made in the heat of the moment are not routinely subject to judicial second-guessing. *See Hudson*, 503 U.S. at 6; *Whitley*,

475 U.S. at 321-22. Accordingly, the judicial inquiry turns on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7; *see Whitley*, 475 U.S. at 321-22.[6]

To be sure, this standard for subjective intent was developed by this Court in *Hudson* and *Whitley* in the context of Eighth Amendment claims, rather than in the context of due process claims brought by pretrial detainees. But "that happenstance" is of no moment for multiple reasons. *Bell*, 441 U.S. at 547 n.29. As already established, the critical factor for constitutional analysis is the fact of incarceration, not the status of a detainee as pretrial or post-conviction. *See supra* pp. 18-24. And this Court has routinely relied on cases involving post-conviction detainees to resolve claims by pretrial detainees, and vice-versa. *See supra* pp. 20-21 & n.4. But there is an additional, particularly powerful reason for this Court to extend the subjective inquiry of *Hudson* and *Whitley* to excessive force claims by pretrial detainees—namely, the very case from which this Court derived the *Whitley-Hudson* standard was a due process claim of excessive force by a pretrial detainee.

It is no secret that "[t]his Court derived" the test it applied in *Hudson* and *Whitley* "from one articulated by Judge Friendly in *Johnson v. Glick*." *Hudson*, 503 U.S. at 7. To the contrary, this Court proudly and expressly borrowed the test from Judge Friendly's characteristically thoughtful opinion. *See id.* In

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[6] This intent can be established through direct or circumstantial evidence.

Johnson, the Second Circuit considered a claim brought by a pretrial detainee alleging that he had been assaulted during the prison's booking process. 481 F.2d at 1029. Judge Friendly, writing for the majority, looked to the Due Process Clause in resolving the detainee's excessive force claim. *Id.* at 1032. Describing what it believed to be the appropriate standard for evaluating such a claim under the Fourteenth Amendment, the Second Circuit reasoned as follows:

> The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, *and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.*

Id. at 1033 (emphasis added). When this Court had to fashion a test for the kind of excessive force that violates the Constitution in the prison context, this Court concluded that the final factor listed in *Johnson* properly captured the showing necessary to separate

uses of force that are inherent aspects of the prison environment from those that cross the constitutional line. *Whitley*, 475 U.S. at 320-21; *see also Hudson*, 503 U.S. at 7.

The Court's reliance on a pretrial detainee due process case in establishing the requisite intent for an Eighth Amendment excessive force claim makes three things abundantly clear. First, the distinction between "good faith effort[s] to maintain or restore discipline" and force that is used "maliciously and sadistically for the very purpose of causing harm" was designed to capture whether a detainee has been punished and not whether that punishment was cruel and unusual. Second, any argument that applying this standard in evaluating an excessive force claim under the Due Process Clause is somehow inappropriate is unsupportable. This is less a case of extending the standard from the Eighth Amendment context than a case of returning the test to the due process roots from which it was "derived." *Hudson*, 503 U.S. at 7; *see also Wilson*, 501 U.S. at 300 (Eighth Amendment case relying on *Johnson*); *Whitley*, 475 U.S. at 320-21 (same); *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (same); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (same); *Ingraham v. Wright*, 430 U.S. 651, 669 n.38 (1977) (same).

Third, and more generally, the Court's reliance in *Hudson* and *Whitley*—post-conviction cases—on a decision adjudicating a pretrial detainee's excessive force claim critically undermines the contention that this is a context where courts should draw constitutional distinctions between pretrial and post-conviction detainees. Excessive force claims are

different and difficult in the incarceration context because, in contrast to the situation in free society, detainees and guards are constantly interacting and the incidents of prison life "require and justify the occasional use of a degree of intentional force." *Johnson*, 481 F.2d at 1033. Moreover, the unique aspects of prison life make inquiries by lay judges and juries challenging, such that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Id.* The fact of incarceration and the unique dynamic created in that setting require the courts to distinguish between "good faith," if imperfect, efforts to restore order and harmful conduct designed "for the very purpose of causing harm." *Id.* In short, everything about the sensitive inquiry first articulated by Judge Friendly and later borrowed by this Court flows from the fact of incarceration and not the detainee's precise status.

Even if the *Whitley-Hudson* standard were not derived from a due process case, there would be nothing extraordinary about drawing on Eighth Amendment doctrine to define due process rights. This Court did exactly that in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In *Lewis*, the Court considered a due process claim brought by the estate of an individual killed as a result of a high speed chase involving police. *Id.* at 836-37. In evaluating that claim, the Court embraced a standard that requires a showing of a subjective intent to harm the suspects being chased. *Id.* at 849-54. That standard, which the Court applied under the Due Process Clause of the Fourteenth Amendment, was drawn directly from the

Eighth Amendment use of force standard articulated in *Whitley*. *Id.* at 853.

In the process of importing the *Whitley* standard, the Court explained that it would be "hard to avoid" analogizing "sudden police chases" to volatile security situations in the incarceration setting. *Id.* Like corrections officials dealing with belligerent inmates, "the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs." *Id.* Both prison officials and police officers in extremis "are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* In light of these considerations, the Court concluded that—as with prison officials operating in the incarceration setting—a showing of "midlevel fault" is not enough. *Id.* "[A] purpose to cause harm," as "is needed for Eighth Amendment liability," is required for "due process liability in a pursuit case." *Id.* at 854.

Of course, no analogies are necessary to justify applying the same legal standards to pretrial and post-conviction detainees. In *Bell*, this Court made clear that there is "no reason to" "distinguish[] between pretrial detainees and convicted inmates in reviewing" challenged prison or jail official conduct. 441 U.S. at 546 n.28. "There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." *Id.* "[T]hose who are detained

prior to trial may in many cases be individuals who are charged with serious crimes," "who have prior records," or who "pose a greater risk of escape than convicted inmates." *Id.* That is "particularly true at facilities like" the Monroe County Jail, "where the resident convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted." *Id.*; *see also Block*, 468 U.S. at 587 (discussing comparative dangerousness of pretrial detainees in many circumstances); *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1520-21 (2012) (noting that even "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals" and acknowledging that "jails can be even more dangerous than prisons").[7]

Nor is there anything about the circumstances of this case that would justify a differential rule for pretrial and post-conviction detainees. If a post-

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[7] As noted at the outset, the Monroe County Jail houses a mix of pretrial and post-conviction detainees. Due to limits on the length of a sentence that can be served at the Jail, in Monroe County, prisoners awaiting trial on the full range of potential criminal charges carrying the full range of sentences are housed alongside convicted prisoners serving largely misdemeanor sentences. *See* Wis. Stat. §§973.02 & 302.31. The National Sheriffs' Association's amicus brief reports that this situation is typical: the split between pretrial detainees and convicted prisoners in local jails across the nation is approximately 60/40. Br. for Nat'l Sheriffs' Ass'n 4. The Sheriffs' brief also reports that housing in local jails is not assigned to pretrial detainees and convicted prisoners based on conviction status alone but instead is assigned based on a wide variety of objective classification factors that, taken together, are far better predictors of who can safely be housed with whom within an institution. *Id.* at 6-7.

conviction detainee had displayed Kingsley's level of intransigence and refused to uncover his light, corrections officials would have removed him from his cell and brought him to a holding cell. And if a post-conviction detainee had actively resisted the removal of handcuffs after the transfer, corrections officials would have faced the exact same dynamic and competing choices. They would have confronted the same need to balance the imperatives to keep order and to keep jail staff and other prisoners safe from injury and the need to safely ensure the detainee's compliance. *See Whitley*, 475 U.S. at 320; *Hudson*, 503 U.S. at 6. Likewise, without regard to whether the detainee being transferred was a pretrial or post-conviction detainee, officials would face the same need to act quickly, under pressure, and without time for thoughtful deliberation. *See id.* The "'ever-present potential for violent confrontation and conflagration'" is no less a concern for pretrial detainees than it is for post-conviction detainees. *Whitley*, 475 U.S. at 321 (quoting *Jones*, 433 U.S. at 132).[8]

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[8] The ACLU contends that, despite this Court's extensive case law to the contrary, the fact of incarceration should be deemed irrelevant here because whether someone is a pretrial detainee (as opposed to at liberty pending trial) may at times be impacted by the individual's socioeconomic status. As this Court long ago noted, "no one familiar with even the barest outline of the problems of the administration of a prison or jail, or with the administration of criminal justice, could fail to be aware of the ease with which one can obtain release on bail or personal recognizance." *Block*, 468 U.S. at 583. "The very fact of nonrelease pending trial thus is a significant factor bearing on the security measures that are imperative to proper administration of a detention facility." *Id.* When individuals detained pending trial are not released on bail, it is most often a

In short, while the fact of incarceration fundamentally alters the constitutional analysis, nothing about the precise status of a detainee makes a material difference to the analysis. This Court has already fashioned an appropriate test for excessive force claims in the incarceration context, and it fashioned it from a due process decision. Under these circumstances, there is no sound argument for not applying the *Whitley-Hudson* test to the excessive force claims of pretrial detainees.

C. At a Bare Minimum, a Pretrial Detainee Should Be Required to Prove Subjective Intent Tantamount to Recklessness.

While all of the foregoing strongly counsels in favor of adopting the standard outlined in *Hudson* and *Whitley*, at an absolute minimum this Court should require some showing of subjective intent, with a recklessness standard providing the only viable alternative. As discussed, this Court in *Lewis* drew on the higher subjective standard from use of force cases

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reflection of the fact that they "are awaiting trial for serious, violent offenses," or that they "have prior criminal convictions." *Id.* at 586. Notwithstanding the position taken by the ACLU, independent data compiled by the Department of Justice reveals these observations remain true today. *See*, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 201932, *Profile of Jail Inmates, 2002* (rev. 2004). Indeed, in 2002 (the most recent survey year), 57.8 percent of all unconvicted detainees in local jails were being held on violent or drug offenses, and only 20.2 percent were being held on miscellaneous public order offenses. *Id.* at 3, Table 3. At the same time, 57.6 percent of all unconvicted detainees in local jails were recidivists, with 30.7 percent of all unconvicted detainees classified as violent recidivists. *Id.* at 7, Table 9.

(proof of an intent to harm), rejecting the "middle range" standard ("deliberate indifference") that applies to prison policies and conditions where officials have the time and opportunity to make deliberate and considered judgments. That latter standard applies, for instance, to Eighth Amendment claims related to conditions of confinement, failure to provide medical care to prisoners, failure to protect prisoners from violence by other prisoners, and certain claims of municipal liability under §1983. *Lewis*, 523 U.S. at 848-50 & n.10 (citing cases); *see Wilson*, 501 U.S. at 297; *Farmer*, 511 U.S. at 834. This Court has already persuasively explained why that standard is inapposite for the kind of split second decisions at issue in excessive force claims in the incarceration context. *See, e.g.*, *Whitley*, 475 U.S. at 320-22; *Hudson*, 503 U.S. at 6-8. But, if this Court does not adopt the *Whitley-Hudson* standard, at least "deliberate indifference," *i.e.*, "subjective recklessness," *Farmer*, 511 U.S. at 839-840, must be shown, and not merely objective unreasonableness, the "lowest common denominator" due care standard. *Lewis*, 523 U.S. at 848-49.

To be found subjectively reckless, a prison official must know of a substantial risk of serious harm to an inmate and disregard that risk by failing to take reasonable measures to respond to it. *Farmer*, 511 U.S. at 847. Subjective recklessness is subject to proof by typical modes, including through the use of circumstantial evidence. *Id.* at 842. Thus, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.*

Here, the district court instructed the jury on precisely such a recklessness standard, and that instruction was approved by the Seventh Circuit on appeal. JA277-78; JA294-95. Indeed, the jury was charged that, to find for petitioner on his claim of excessive force, it was required to conclude that respondents knew that using force presented a risk of harm to petitioner but nonetheless recklessly disregarded his safety by failing to take reasonable measures to minimize the risk of harm. The jury was permitted to conclude that respondents behaved in such a reckless manner from a non-exclusive list of six factors, *see id.*, drawn directly from *Whitley* and *Hudson*. *Compare* JA295 *with Whitley*, 475 U.S. at 320-21, and *Hudson*, 503 U.S. at 7.

That instruction was unduly favorable to the petitioner, and the district court should have accepted respondents' proposed instruction embodying the higher standard of *Whitley* and *Hudson*. But the district court's instruction plainly required a finding of subjective recklessness, which at least gives some meaning to this Court's teaching that punishment under the Due Process Clause requires some intent to punish. As the Seventh Circuit correctly reasoned, it is "clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases" and the district court's instruction "reflected this requirement." JA307.

Because the jury was instructed under the less-stringent recklessness standard—and Degner and Hendrickson prevailed—the officials necessarily would have also prevailed under the more rigorous

Whitley-Hudson standard. *See Whitley*, 475 U.S. at 320-21 (describing the malicious and sadistic intent to harm standard as stricter than the deliberate indifference standard); *Hudson*, 503 U.S. at 5-12 (describing both an objective and a subjective component to an excessive force claim under the Eighth Amendment). As a result, whether this Court adopts the higher standard demanded by *Whitley*, *Hudson*, and Judge Friendly or the middle-ground subjective recklessness standard embodied in the district court's instruction, the judgment entered in favor of respondents following a 3-day jury trial should be affirmed.

D. A Subjective Intent Requirement Is Necessitated by the Realities of Litigating Excessive Force Claims.

A subjective intent requirement strikes the proper balance between protecting the constitutional rights of prisoners and shielding corrections officials from costly and time-consuming litigation. While most free individuals interact with police officers only episodically (if ever), incarcerated individuals constantly interact with corrections officials in ways that give rise to countless opportunities for friction, potential insubordination, and the possible use of force. Moreover, incarcerated individuals are not only in constant contact with state actors, but because of their incarceration they have substantial time to contemplate potential litigation. Both Congress and this Court have recognized this reality and in various ways made it more difficult for suits by prisoners to be brought (principally through the PLRA) and to succeed (principally through doctrines of deference

like that of *Turner v. Safley*). In the specific context of excessive force claims by incarcerated individuals, it is the standard of *Whitley* and *Hudson* that protects against a relative flood of claims. The vast majority of courts already have applied the *Whitley-Hudson* standard to pretrial detainee excessive force claims.[9]

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[9] *See, e.g., United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999) ("Because all excessive force claims in the prison context are qualified, ... we conclude that the *Hudson* analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well"); *Fuentes v. Wagner*, 206 F.3d 335, 347-48 (3d Cir. 2000) ("We can draw no logical or practical distinction between a prison disturbance involving pretrial detainees, convicted but unsentenced inmates, or sentenced inmates. Nor can prison guards be expected to draw such precise distinctions between classes of inmates when those guards are trying to stop a prison disturbance."); *Carr v. Deeds*, 453 F.3d 593, 605 (4th Cir. 2006) ("[E]xcessive force claims of pretrial detainees are governed by the Due Process Clause," and "[t]he proper inquiry is whether the force applied was in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.") (quotation marks and citations omitted); *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993) (noting that "it is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security"); *Shreve v. Franklin Cnty.*, 743 F.3d 126, 134 (6th Cir. 2014) (affirming earlier holding that Eighth Amendment standard applies to excessive force claims by pretrial detainees in "rapidly evolving, fluid, and dangerous predicament[s] which preclude the luxury of calm and reflective pre-response deliberation"); *accord Young v. Wolfe*, 478 F. App'x 354, 356 (9th Cir. 2012); *Bozeman v. Orum*, 422 F.3d 1265, 1272 (11th Cir. 2005); *Norris v. District of Columbia*, 737 F.2d 1148, 1150 (D.C. Cir. 1984) (citing to *Johnson v. Glick* formulation of standard, including question of whether force was used "in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm"). Moreover, the Eighth and Tenth Circuits apply a standard that looks to

If this Court endorses a less rigorous standard, it will inevitably produce a jump in the number of excessive force cases brought by pretrial detainees.

In many contexts, corrections officials are protected by qualified immunity rules that shield public servants who do not violate clearly established constitutional norms. But qualified immunity will not provide robust protection for corrections officials if this Court accepts petitioner's invitation to adopt a purely objective reasonableness standard. Courts have found it particularly difficult to apply qualified immunity when the underlying constitutional norm prohibits unreasonable conduct. In both *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Saucier v. Katz*, 533 U.S. 194 (2001), this Court corrected decisions by lower courts that could not perceive how an officer could be "reasonably unreasonable" in conducting a search or using force. And despite *Saucier v. Katz*, lower courts commonly view excessive force claims as too fact-bound to admit of application of a qualified immunity defense, as this case well-illustrates. Both the allegations in this case and in a separate case in which petitioner alleged that he was a victim of excessive force resulted in jury trials, even with the application of a subjective standard. In both cases, the corrections officials prevailed, but only after incurring the expense and disruption of a full-blown jury trial. Given the constant interaction of corrections officials and incarcerated individuals, and the inherent ability of a recalcitrant detainee to prompt a confrontation

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subjective intent and is not wholly objective. *See, e.g.*, *Jackson v. Buckman*, 756 F.3d 1060, 1067 (8th Cir. 2014); *Booker v. Gomez*, 745 F.3d 405, 423, 426 (10th Cir. 2014).

through insubordination and intransigence, excessive force claims in the incarceration context are easy to allege and hard to disprove. The more demanding *Whitley-Hudson* standard provides corrections officials with a desperately needed layer of protection in such cases.

Last but by no means least, a standard that requires proof of bad intent and objective excessiveness is necessary to ensure that jail officials like Degner and Hendrickson are not held liable for doing nothing more than following their training. The facts here amply demonstrate that the only way Degner and Hendrickson could possibly be held liable is if a jury is permitted to second guess the amount of force employed—an amount Degner and Hendrickson had long been instructed they could employ under the circumstances. The jail officials' thoughtful approach and measured response to petitioner's belligerence make it highly unlikely that any jury would conclude Degner and Hendrickson acted maliciously and sadistically. But if the only question is whether they acted reasonably, there is a very real risk that a jury might hold them liable for conduct that "may later seem unnecessary in the peace of a judge's chambers." *Johnson*, 481 F.2d at 1033.

III. Importing The Purely Objective Test Applied To Excessive Force Claims Brought By Free Individuals Into The Incarceration Setting Is Unnecessary And Ill Advised.

Rather than employ a standard tailor-made for the incarceration context and derived from a seminal due process case, petitioner would have this Court fashion a constitutional standard from the Fourth

Amendment test that governs the use of force against free individuals. That proposed course has nothing to recommend it.

To the extent petitioner would simply borrow the standard applicable outside prison walls without any adjustment for the realities of incarceration, that would ignore decades of precedents making clear that the fact of incarceration fundamentally alters the constitutional rights of pretrial and post-conviction detainees alike. But to the extent petitioner envisions lay judges and juries taking into account the realities of prison life as part of an all-encompassing inquiry into whether the force used was reasonable, that approach suffers from both doctrinal and practical defects. Such an approach makes little sense doctrinally, because not every unreasonable use of force amounts to punishment, and punishment is what the Due Process Clause forbids. It would also ignore this Court's repeated admonitions about the need to defer to the difficult judgments made by corrections officials. And this approach has little to recommend it practically; there is no need to adjust a Fourth Amendment standard for the realities of incarceration when this Court has already developed a standard applicable to excessive force claims in the incarceration context, namely the *Whitley-Hudson* standard.

The United States, for its part, attempts to derive a purely objective standard from *Bell*. But *Bell* quite clearly provides just the opposite, making clear that the dispositive inquiry is whether there is punishment, which clearly requires a subjective showing. In a final last ditch effort, petitioner argues

for the first time in this Court that the Fourth Amendment can apply directly such that each use of force against a detainee is a new seizure that can be tested for reasonableness. That proposal is forfeited, but in all events would work a revolution in prisoner litigation, as its logic would apply equally to all detainees, despite the well-established *Whitley-Hudson* standard. In the end, it is that well-established test, and neither a novel reading of *Bell* nor a revolutionary theory of the Fourth Amendment, that should govern excessive force claims like petitioner's.

A. Adopting the Fourth Amendment Standard Wholesale in the Incarceration Context Would Ignore Decades of Precedent Making Clear That the Fact of Incarceration Fundamentally Changes the Constitutional Analysis.

To the extent that petitioner's argument proceeds from the premise that detainees, whether convicted or not, stand on the same constitutional footing as free individuals, it is a non-starter. That proposition is fundamentally incompatible with an entire line of this Court's cases going back decades. As this Court has made clear in the specific context of pretrial detainees, "[a] detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Bell*, 441 U.S. at 546; *see supra* Part I.

Here, petitioner was not a free citizen during the incident in question, and his rights are simply not the same as those of individuals at liberty entitled to the full protection of the Fourth Amendment. Thus, it makes little sense for the analysis of his excessive

force claim to be premised on the principles that govern the claims of individuals who are at full liberty. The expectations of an individual buying orange juice at a convenience store, *see Graham*, 490 U.S. at 395, have no direct application to an individual who has spent 30 days in a county detention center after multiple court appearances.

In too many contexts to catalog, this Court has applied constitutional principles to detainees, pretrial and post-conviction alike, in ways that bear little resemblance to comparable claims by free individuals. In *Block*, for instance, the Court upheld against a Fifth Amendment challenge a ban on contact visits, 468 U.S. at 588, and, in *Bell*, the Court upheld a ban on most hardback books, 441 U.S. at 550. Restrictions that would be obviously unconstitutional outside prison walls are upheld as reasonable, non-punitive measures in the unique setting of incarceration. Thus, to whatever extent petitioner would suggest that Fourth Amendment principles should apply more or less unmodified to pretrial detainees, the argument is simply not tenable.

B. Applying a Modified Fourth Amendment Test Is Doctrinally Incoherent and Practically Unworkable.

To the extent petitioner's proposal is to borrow the Fourth Amendment's protection against unreasonable uses of force and then have the realities of prison life inform what is reasonable, that proposal makes no sense either practically or doctrinally. From a practical standpoint, once it is conceded that the constitutional standard for excessive force claims by free individuals needs to be adjusted for the fact and

realities of confinement, then there is no good reason not to apply the test already developed by this Court for the specific context of excessive force claims by incarcerated individuals, *i.e.*, the *Whitley-Hudson* standard. Indeed, there is no reason to borrow and adjust when this Court has already developed a standard that is tailor-made for the incarceration context.

Importing an objective reasonableness standard from the Fourth Amendment into the Fourteenth Amendment excessive force claim analysis also makes little sense doctrinally. The text of the Fourth Amendment is the source of the constitutional protection against the use of excessive force by police officers in the course of investigatory stops, arrests, or other seizures of free individuals. *See Graham*, 490 U.S. at 395. That explicit language—the right of individuals "to be secure in their persons ... against unreasonable ... seizures"—is the source of the objective reasonableness standard that governs excessive force claims in those contexts. *Id.* at 394-99. But incarcerated individuals have already been lawfully seized in ways that fully comport with the Fourth Amendment. It is the Due Process Clause that protects them, and there is no such textual source for a similar objective reasonableness test in the Due Process Clause.

By contrast, the *Whitley-Hudson* excessive force standard has been explicitly "derived" from a due process standard, *Hudson*, 503 U.S. at 7, and makes doctrinal sense. The Due Process Clause forbids the punishment of pretrial detainees, punishment requires an intent to punish, and the *Whitley-Hudson*

standard captures the requisite intent to punish in the incarceration context. Indeed, even outside the incarceration context, this Court has applied the *Whitley-Hudson* standard when the free individual's protection flowed from the Due Process Clause, rather than the Fourth Amendment. *See Lewis*, 523 U.S. at 836-37.

The Fourth Amendment inquiry into objective reasonableness is a misfit in a due process inquiry for the straightforward reason that not every use of force that appears unreasonable with the benefit of hindsight constitutes punishment. It is thus entirely unsurprising that a different standard would exist for excessive force claims under the Fourth and Fourteenth Amendments because the term "'punishment[]' clearly suggest[s] some inquiry into subjective state of mind, whereas the term 'unreasonable' does not." *Graham*, 490 U.S. at 398. Given that difference, it only makes sense that the due process standard would be built on doctrine defining "punishment"—not transplanted from the different text of a distinct constitutional provision—and that also satisfies the requirement that "punishment" be established through a showing of subjective intent to punish. *See, e.g.*, *Wilson*, 501 U.S. at 300 ("The infliction of punishment is a deliberate act intended to chastise or deter.").

Importation of an objective reasonableness standard would also run afoul of this Court's considered conclusion that negligence is insufficient to establish a constitutional violation under the Fourteenth Amendment. For example, in *Lewis*, this Court expressly rejected a mere reasonableness

standard under the Fourteenth Amendment. *Lewis*, 523 U.S. at 848 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976), and *Daniels v. Williams*, 474 U.S. 327, 332 (1986)). Due care is not the standard that governs such claims, as "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 849 (citing *Daniels*, 474 U.S. at 328, and *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). As this Court explained in *Daniels*, "lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person" and "[t]o hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." 474 U.S. at 332.

Despite this Court's emphatic rejection of negligence as the threshold for a due process violation, petitioner proposes just that. If corrections officials violate the Constitution every time their use of force is deemed unreasonable, then it is hard to understand the due process test as anything other than a requirement that they use due care, or due force, whenever they face the difficult decision to use force on an uncooperative and potentially dangerous detainee. This much is made plain by petitioner's own comparison of his proposed standard to an "objective reasonableness" training standard used for certain detention officials. *See* Pet'r Br. 25-26. The violation of a training manual may provide some evidence of negligence or liability under other state tort law, but it does not amount to unconstitutional punishment or otherwise violate due process. *See, e.g.*, *Daniels*, 474 U.S. at 332 ("Far from an abuse of power, lack of due care suggests no more than a failure to measure up to

the conduct of a reasonable person"); *Lewis*, 523 U.S. at 849 ("the Constitution does not guarantee due care on the part of state officials").

As the brief submitted by the corrections amici suggests, local corrections practices throughout the Nation are already closely dictated and monitored by and through state statutes, administrative regulations, training standards, and departmental policies. And it is self-evident that the violation of such standards might lead to internal discipline, closer scrutiny or control by regulatory bodies, liability under state or local law, or even the imposition of a judicial consent decree. But state and local laws do not define the parameters of the Constitution. *DeShaney v. Winnebago Cnty. Soc. Serv. Dep't*, 489 U.S. 189, 202 (1989). And the existence of myriad remedies under state and local law for unreasonable force by corrections officials provides yet another compelling justification for not interpreting the Due Process Clause as the first and final arbiter of what constitutes a lack of due care in this context. *See Hudson v. Palmer*, 468 U.S. 517, 530 (1984); *McMillian*, 503 U.S. at 28-29 (Thomas, J., dissenting).[10]

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[10] It is important to note that the corrections amici do not accurately characterize many of the principal sources they cite in support of the proposition that a consensus exists in the corrections field in favor of an objective reasonableness standard. *See, e.g.*, American Correctional Association, *Adult Local Detention Facilities*, Standard 2B-01 at 32 (4th ed. 2004) (stating that, "[i]n no event is physical force used as punishment"); LETRA, Inc., *Model Use of Force Policy*, §7.0.12b (Oct. 29, 2014) ("Staff are expected to use force, when necessary, within that reasonable range, to act in good faith ... "); ABA,

But the problems do not end there. Petitioner's proposed purely objective test cannot be squared with this Court's body of deference precedent. That precedent mandates "that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Whitley*, 475 U.S. at 322. And that deference applies with particular force to actions "taken in response to an actual confrontation with" an inmate, *id.*, and applies equally to actions respecting both pretrial and post-conviction detainees, *Bell*, 441 U.S. at 547 n.29.

A purely objective standard provides no deference. By definition, such a standard would ask a judge or jury to decide whether a jail or prison official's actions were reasonable under the facts and circumstances as they existed at that time. That is exactly the sort of second guessing that this Court's deference precedents

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Standards for Treatment of Prisoners, Standard 23-5.6 (stating that corrections officials should not use force "to gratuitously inflict pain or suffering, punish past or present conduct ... "); Letter from Loretta King, Acting Assistant Attorney General, U.S. Dep't of Justice Civil Rights Division, to Marlin N. Gusman, Orleans Parish Criminal Sheriff, at 4 (Sept. 11, 2009) (stating that the Eighth and Fourteenth Amendments forbid the use of excessive force against inmates and pretrial detainees and that "[t]he standard for measuring the appropriateness of the force used is 'whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm'") (quoting *Hudson*, 503 U.S. at 6, quoting *Johnson*, 481 F.2d at 1033). Regardless, while the various model policies, departmental guidelines, statutes, and regulations cited by the corrections amici address to varying degrees what might be expected of corrections officials under state law or by way of local departmental practice, *none* addresses the standard set by the Due Process Clause.

unequivocally forbid. Such second guessing would immeasurably increase the already "inordinately difficult" task of running a corrections facility, an outcome this Court has been trying to avoid for at least 40 years. *Turner*, 482 U.S. at 854; *see Bell*, 441 U.S. at 547. Such a non-deferential test will also lead to more litigation, contrary to Congress' judgment in the PLRA. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002) ("Beyond doubt, Congress enacted" the PLRA "to reduce the quantity ... of prisoner suits."). And petitioner's reasonableness standard is one that courts have struggled to apply in a way that provides corrections officials with meaningful qualified immunity. *See supra*.

There is one final problem with petitioner's purely objective standard: it is not what they argued below. Before the Seventh Circuit, petitioner explicitly disavowed any argument that the applicable constitutional standard is purely objective. *See* CA7 Appellant Reply Br.2 ("Appellees wrongly attempt to recast the standard advocated by [petitioner] as a 'wholly objective' standard. ... However, Appellees' attempted revision fails because [petitioner] did not argue that the Fourteenth Amendment requires a 'wholly objective' approach."). That concession simply underscores that while the purely objective standard is an appropriate Fourth Amendment protection for free individuals, it is a misfit when it comes to the due process claims of incarcerated individuals.

C. *Bell* Does Not Establish an Objective Standard.

Both petitioner and the government attempt to read a purely objective test into this Court's decision

in *Bell*. Pet'r. Br.19; U.S. Br.15. But *Bell* held the opposite, making clear that the dispositive inquiry was whether the challenged policies inflicted punishment. What petitioner and the government try to characterize as an independent and purely objective inquiry into government goals and their relationship to conditions of confinement was merely a proxy for determining the subjective intent of jail officials. This is made clear at the very least by the sentence in *Bell* that immediately follows the portion of the opinion excerpted by petitioner, *see* Pet'r. Br.18:

> [I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

441 U.S. at 539.

Petitioner further misconstrues *Bell* in equating the due process standard that case employs to evaluate conditions of confinement claims with the Fourth Amendment objective reasonableness analysis. Indeed, under *Bell*, absent an express intent to punish, an institutional policy creating a particular condition or restriction for the incarceration of pretrial detainees passes muster under the Due Process Clause so long as any rational explanation reasonably related to the condition or restriction in question can be articulated. Put differently, if the condition or restriction at issue is not altogether arbitrary or purposeless, it is not unconstitutional. *Id.* at 538-39. That analysis may apply more directly to challenges

to conditions and policies than to individual uses of force, but it reflects the reality that the use of force as a general matter is rationally related to preserving order and maintaining discipline. Thus, the question naturally turns to whether the specific use of force violates the Constitution, and the subjective test of *Whitley-Hudson* is tailor-made to answer that question.

The government is ultimately forced to concede, with considerable understatement, that there is no "clear" support in this Court's cases for the position that the *Bell* test includes an objective prong completely divorced from a finding of intent. U.S. Br.15. In reality, this Court's cases make clear that *Bell*'s two prong inquiry is designed to identify punitive *intent* and does not smuggle in an entirely new and "independent *legal* basis for classifying governmental action as punitive." *Id.* First, it is clear from cases like *Youngberg v. Romeo*, 457 U.S. 307 (1982), that the inquiry looks not to objective reasonableness, but to the presence or absence of any rational professional judgment. In *Youngberg*, the Court examined a due process claim brought by the mother of a disabled individual involuntarily committed to a state mental hospital. The specific challenge brought by the mother related to physical restraints utilized by the institution with her son and the level of training provided to her son in the facility. 457 U.S. at 315-17. Citing *Bell*, among other cases, the Court concluded that due process protections demanded only that professional judgment have been exercised by the treating professionals at the institution and that it would not be appropriate for a court to select among different professionally

appropriate choices that might have been made. *Id.* at 321-22. According to the Court, only in the *complete absence* of any professional judgment could liability have been imposed. *Id.* at 323.

Likewise, petitioner ignores the full holding of *County of Sacramento v. Lewis*, 523 U.S. at 833, which, as explained, supports adoption of the *Whitley-Hudson* standard. Petitioner correctly notes that the *Lewis* Court observed that general principles of due process prohibit arbitrary governmental action or the exercise of governmental authority without any reasonable justification. 523 U.S. at 845-46. But, far from adopting an objective test for arbitrary or wholly unjustifiable government action, the Court in *Lewis* went on to hold in the context of high speed police pursuit cases that the Due Process Clause requires a specific showing that the defendant officers subjectively intended to harm the suspects being pursued. *Id.* at 854. Indeed, *Lewis* preferred this more demanding subjective standard over even a middle ground subjective standard of criminal recklessness—*i.e.* deliberate indifference. *Id.* at 849-54. To suggest that *Lewis* supports the conclusion that a purely objective standard applies to due process claims such as petitioner's is to ignore the holding of the case.

D. The Fourth Amendment Does Not Apply Directly Because the Use of Force During Pretrial Detention Does Not Effect a Fourth Amendment Seizure.

For the first time in this litigation, petitioner makes the radical alternative argument that the Fourth Amendment applies directly to the use of force

against pretrial detainees, such that each use of force is a continuing or new seizure that must be measured for reasonableness. As an initial matter, this argument is forfeited. Petitioner did not make this argument to the district court in objecting to the jury instruction on excessive force. JA229-33. Nor did petitioner raise it on appeal to the Seventh Circuit. *See* CA7 Appellant Br.11; CA7 Appellant Reply Br.2. Accordingly, the Seventh Circuit did not pass on this novel theory. For these reasons, it is not properly before this Court. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430-31 (2012); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989). In all events, petitioner's failure to raise this argument below was entirely prudent as this novel argument would work a revolution in prisoner litigation and is entirely incompatible with this Court's precedents.[11]

Petitioner's contention that pretrial detainees are "subject to a continuing seizure" as a result of their detention is contrary to logic and wholly unsupported by this Court's cases, as the government's brief demonstrates. *See* U.S. Br.20-22. Placement in

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[11] Petitioner concedes that "he was being lawfully detained and awaiting trial" and that "the initial seizure of his person was arguably complete." Pet'r. Br.32. In fact, as petitioner points out, by the time of the events in question on May 21, 2010, petitioner had been in custody a full 30 days and already had been before a judicial officer three times. *Id.* at 3 n.1 & 30 n.10. Whether or not an open question remains as to the precise point at which the protections of the Fourth Amendment end and those of the Fourteenth Amendment begin, petitioner clearly was no longer an arrestee on the day at issue, and petitioner makes no such argument to this Court.

detention is what "results in restricting the movement of [the] detainee," *Bell*, 441 U.S. at 537, not any later use of force against the detainee, who remains unalterably seized during his entire period of detention. The cases petitioner invokes are not to the contrary, and do not even consider whether pretrial detainees remain subject to the Fourth Amendment throughout their detention. Petitioner argues in the alternative that each additional "physically intrusive" restriction on a criminal detainee's freedom of movement constitutes a *new* seizure that is governed by the Fourth Amendment. But, as the government observes, that novel theory is also completely unsupported by any case from this Court, and the cases petitioner does cite do not involve incarcerated persons at all but instead address Fourth Amendment seizure claims raised by free individuals. *See, e.g.*, *California v. Hodari D.*, 499 U.S. 621 (1991); *Graham*, 490 U.S. at 386; *Terry v. Ohio*, 392 U.S. 1 (1968); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Brower v. Cnty. of Inyo*, 489 U.S. 593 (1989).

More fundamentally, petitioner's contentions are incompatible with this Court's precedents and would work a revolution in prisoner litigation. Far from scrutinizing state officials' actions to find distinct, new seizures governed by the objective reasonableness standard of the Fourth Amendment, in *Hudson v. Palmer*, 468 U.S. 517, 526 (1984), this Court held in the context of convicted prisoners that the Fourth Amendment is *inapplicable* to searches of prison cells. And in *Bell*, this Court reserved the question of whether the Fourth Amendment had any application in the incarceration context, but rejected challenges to cell searches and visual body cavity searches on

reasoning that was premised on the inapplicability of normal Fourth Amendment principles. *See* 441 U.S. at 556-57 (noting that "even the most zealous advocate of prisoners' rights would not suggest that a warrant is required to conduct such a search").

Petitioner's proposed Fourth Amendment approach would multiply the opportunities for prisoner litigation exponentially, as searches and seizures are ubiquitous in the incarceration context. Presumably, under petitioner's theory, the Fourth Amendment would come into play every time jail guards forcibly move a detainee from one cell to another, every time a detainee is stopped against his or her will while moving from the mess hall back to a housing area, and every time a detainee is stopped and searched for contraband.

Worse still, as the government underscores, petitioner's new rule could not logically be cabined to apply only to pretrial detainees, and instead would apply equally to any new restrictions or intrusions made on *convicted* prisoners who would otherwise be governed by the Eighth Amendment. *See* U.S. Br.22. Such an approach is wholly incompatible with *Whitley*, *Hudson*, and a host of other precedents, which underscores that petitioner's theory is fundamentally misguided.

IV. If The Court Were To Side With Petitioner As To The Appropriate Standard For Excessive Force Claims, Affirmance Would Still Be Required.

Even if this Court were to adopt a Fourth Amendment objective reasonableness standard for pretrial detainee excessive force claims, affirmance

would still be required for two independent reasons. First, that was clearly not the law of the Seventh Circuit at the time of the events in question. Thus, Hendrickson and Degner are entitled to qualified immunity. Although qualified immunity has proven difficult for courts to apply in run-of-the-mill excessive force cases, those problems would not be present here. If this Court adopts an objective reasonableness test, it would clearly be changing the governing law of the Seventh Circuit. The jury was instructed consistent with the law of the Seventh Circuit, and respondents prevailed under that standard after a three-day jury trial. If the law now changes, it should not deprive respondents of qualified immunity since the reasonableness of their actions is governed by the clearly established law at the time of their challenged primary conduct. Contrary to the government's suggestion, there is no need for a remand on this question. If this Court resolves the purported circuit split, rejecting the Seventh Circuit standard in favor of a more detainee-friendly standard, the applicability of qualified immunity would be self-evident.

Qualified immunity assures that officials "will not be held personally liable as long as their actions are reasonable in light of" current law. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987). "'[E]xisting precedent must have placed the statutory or constitutional question' confronted" "'beyond debate'" in order for qualified immunity to be unavailable. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

A Fourth Amendment objective unreasonableness standard was manifestly not the law governing excessive force claims brought by pretrial detainees when petitioner was detained at Monroe County Jail. As the Seventh Circuit explained, the precedents of that court "recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind" when evaluating a pretrial detainee's excessive force claim. JA303; JA307 ("our cases are clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases"). Should this Court adopt an objective reasonableness standard for excessive force claims brought by pretrial detainees, it would be establishing a new standard of liability for such claims, and that standard would come too late to deprive respondents of qualified immunity.[12]

Second, if the Court sides with petitioner on the appropriate standard, it could hold—as the government suggests—that the district court's instructions "are most fairly read" to reflect that standard. U.S. Br.9; *id.* at 29 ("the jury instructions

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[12] Petitioner suggests in his opening brief that respondents failed to preserve the qualified immunity issue. Pet'r. Br.9 n.3. Not so. Hendrickson and Degner have raised qualified immunity at every turn. Respondents first sought qualified immunity as part of their summary judgment motion. R.28, pp. 18-22. Respondents next argued for qualified immunity in their Rule 50 motions at trial. R.158, pp. 83-85. And respondents preserved their qualified immunity argument on appeal before the Seventh Circuit. CA7 Appellee Br.28-29. Respondents also raised the qualified immunity issue in their brief in opposition to certiorari. Opp. at 17 n.1 ("Incidentally, even if the Court were" to side with petitioner, respondents "would be entitled to qualified immunity.").

nearly mirrored the Fourth Amendment approach that petitioner favors"). Though that is not the view of the instructions that the district court or the Seventh Circuit embraced, to the extent this Court finds the government's argument persuasive, that argument too would require affirmance even in the wake of the adoption of a purely objective standard.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF

I. THE FOURTEENTH AMENDMENT ANALYSIS FOR PRETRIAL DETAINEES IS DIFFERENT FROM THE ANALYSIS APPLIED TO CONVICTED PRISONERS.

Ignoring this Court's clearly articulated differences between the liberty interests held by pretrial detainees and convicted prisoners, as well as the permissible governmental interests that apply to each, respondents insist that "the fact of incarceration" should lead to a single legal standard for all incarcerated persons' claims. The principle underlying respondents' test is a near-absolute deference to correctional officers that would insulate them from accountability beyond established constitutional standards. Respondents' test does not comport with *Bell* v. *Wolfish*, 441 U.S. 520 (1979), or this Court's other related precedent of the last forty years.

A. The Fact of Incarceration is Not a "Game-Changer" That Alters the Analysis for Pretrial Detainees' Due Process Claims.

Respondents insist repeatedly that subjective intent is a requirement for pretrial detainees' excessive force claims because "the fact of incarceration fundamentally affects the constitutional rights of incarcerated individuals." Br. Resp'ts 18. As a corollary to this blanket assertion, they characterize this Court's cases as driven primarily by a "need" to defer to corrections officers. Br. Resp'ts 23. Neither claim is correct.

1. The "fact of incarceration" is not a "game-changer." Br. Resp'ts 20. Respondents reach this conclusion by improperly collapsing this Court's ju-

risprudence on two important dimensions. First, they ignore the profoundly different governmental interests that States possess in dealing with pretrial detainees and convicted prisoners. Although the government surely has legitimate interests regarding a pretrial detainee, they all stem from its threshold interest in "detain[ing] him to ensure his presence at trial." *Bell*, 441 U.S. at 536; see also *id.* at 539–40. A State, however, may pursue a broader range of interests with convicted prisoners—most notably its "legitimate penological objectives," which include deterrence and rehabilitation. *Pell* v. *Procunier*, 417 U.S. 817, 822–23 (1974); see also *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987). As respondents' authorities describe, this battery of policies and goals applies only after a conviction obtained "in accordance with due process of law." *Pell*, 417 U.S. at 822; see also *Jones* v. *N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977). Within the Eighth Amendment's limits, the government may thus impose "restrictive and even harsh" conditions simply as "part of the penalty that criminal offenders pay for their offenses against society." *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). Respondents, however, seek to erase the distinction between these sets of governmental interests and "improperly extend the legitimate reasons for which [pretrial detainees] are detained—to ensure their presence at trial." *Sandin* v. *Conner*, 515 U.S. 472, 484 (1995).[1]

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[1] These governmental interests may influence the *application* of the relevant constitutional tests, but never alter their substance. Courts ably account for the kinds of governmental interests that are not present when police encounter a suspect on the street, such as the need to maintain order or the risk of escape. Thus, *Bell*'s rejection of certain "constitutional claims of pretrial detainees that surely would have succeeded" if brought by free citizens, Br. Resp'ts 22, is simply a product of the differ-

Second, even when the governmental interests concerning pretrial detainees and convicted prisoners align significantly, prison officials must respect the categorical difference between the due process rights of detainees and the Eighth Amendment rights of convicted prisoners. Although respondents argue that a person's pre-or-post-conviction status is "far less relevant" than the simple fact of incarceration, Br. Resp'ts 20, this Court has recognized that pretrial detainees retain *greater* rights than their convicted counterparts because they have not yet received the process they are due prior to a deprivation of liberty. See, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739, 746 (1987) (noting that detainees are protected from "impermissible punishment before trial"); *Bell*, 441 U.S. at 535–36; cf. *Ingraham* v. *Wright*, 430 U.S. 651, 671 (1977) (finding Eighth Amendment inapplicable to public school students' claims regarding corporal punishment and applying Fourteenth Amendment). The Court has most clearly drawn this distinction in the conditions of confinement context: convicted prisoners must demonstrate "deliberate indifference" to "basic human needs" to prevail under the Eighth Amendment, *Rhodes*, 452 U.S. at 347, but a pretrial detainee's due process claim turns on the less demanding *Bell* standard. 441 U.S. at 537–39. The differing liberty interests of the persons involved justify the "distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Id.* at 537.

Respondents also ignore the distinct constitutional texts that provide the foundation for these varying standards. Under the Eighth Amendment, convicted

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ent government interests in play, rather than any additional substantive showing that detainees must make.

prisoners may be subjected to punishment, but not punishment that is cruel and unusual; by expressly identifying a mental state, that clause forbids only the "'unnecessary and wanton infliction of pain.'" *Ingraham*, 430 U.S. at 670 (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976)). But the Due Process Clause's guarantee that no State shall "deprive any person of life, liberty, or property, without due process of law" contains no mental state, and this Court has distinguished the rights of pretrial detainees from those of convicted prisoners by negative implication: pretrial detainees are protected against *any* official conduct that is "not reasonably related to a legitimate goal." *Bell*, 441 U.S. at 539; see also *Block* v. *Rutherford*, 468 U.S. 576, 583–84 (1984). In short, this Court has concluded that an individual's status matters, both because of the greater liberty interests of pretrial detainees and the limited governmental interests that apply to their detention.

By eliminating carefully-drawn distinctions between the applicable governmental interests and liberty interests, respondents propose a freewheeling standard that would usurp the role of district judges and juries, driven mainly by jailers' own preferences. Respondents baldly suggest that guards' "training," and not established legal standards, should be the measure of detainees' due process rights. Br. Resp'ts 40. They repeatedly urge that deference to jailers' decisions is essential even when a factfinder would conclude that no objective evidence could justify those decisions. See, *e.g.*, Br. Resp'ts 23. And by warning of "a relative flood of claims" by "incarcerated individuals," Br. Resp'ts 38, who "have ample time to contemplate potential litigation against" prison officials,

Br. Resp'ts 21,[2] they impugn the ability of district courts to sort frivolous excessive-force claims from sound ones. *E.g.*, Br. Resp'ts 39. In the end, respondents' broad and selective statements mischaracterize this Court's precedents: none of the cases they cite stands for the proposition that the rights under the Fourteenth Amendment simply collapse into the Eighth, or that governmental interests pertaining to convicted prisoners apply equally to every person who enters a correctional facility.

Stripped of these improper generalizations, respondents' argument that the Eighth Amendment standard of *Whitley* v. *Albers*, 475 U.S. 312 (1986), and *Hudson* v. *McMillian*, 503 U.S. 1 (1992), should be extended to pretrial detainees' due process claims falls flat. See Br. Resp'ts 26–27. *Whitley* and *McMillian* dealt exclusively with convicted prisoners' excessive force claims, and both decisions turned on this Court's interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause. *Whitley*, 475 U.S. at 319 (holding that that Clause proscribes "obduracy and wantonness, not inadvertence or error in good faith"); see also *McMillian*, 503 U.S. at 6. But the Due Process Clause and this Court's cases interpreting it do not turn on the government actor's good faith. Pretrial detainees have a liberty interest in treatment "reasonably related to a legitimate governmental objective" other than punishment, regardless of the official's mental state, because detainees have not yet received the process due before they may be subjected to punitive conditions. *Bell*, 441 U.S. at 539. Thus, if a finder of fact concludes that a use of

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[2] Of course, because many pretrial detainees are never convicted of the charged crime, some excessive-force plaintiffs are not incarcerated at the time they bring suit and have resumed their normal lives.

force against a detainee is objectively unreasonable in relation to the government's security interest, no further showing is required.

2. Respondents also advance a remarkable proposition: that deference to jail officials trumps any textual or historic distinctions among the constitutional provisions that arise in cases brought by pretrial detainees and convicted prisoners. Br. Resp'ts 23; see also Br. Resp'ts 20, 24, 48. Respondents' deference mantra goes too far, asking this Court for something it has expressly sought to avoid: excessive judicial involvement in "policies and predilections" that are divorced from the governing constitutional provisions. *Wilson* v. *Seiter*, 501 U.S. 294, 300 (1991). Respondents invoke deference to bless all manner of policies that they deem desirable, but that are not tethered at all to the constitutional text. See Br. Resp'ts 37–38 (likening the deference rule to the PLRA as a mechanism for making "it more difficult for suits by prisoners to be brought" and as a means for avoiding "flood[s] of claims"); Br. Resp'ts 49 (stating that a non-deferential test will lead to more litigation). In truth, though deference plays a role in determining the standard of review or scrutiny given to certain types of constitutional claims, it does not do the work that respondents assign to it.[3]

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[3] In addition to overstating the need for deference, respondents overstate the dangerousness of pretrial detainees. The same report referenced by respondents shows that 42.5% of pretrial detainees have no previous sentence, compared to 35.3% of convicted prisoners. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 201932, *Profile of Jail Inmates, 2002* 7, Table 9 (rev. 2004), *available at* http://www.bjs.gov/content/pub/pdf/pji02.pdf. Respondent reported that 57.6% of pretrial detainees are recidivists, but this figure includes the 26.9% that are nonviolent. *Id.* Neither dangerousness nor recidivism is dispositive of bail inquiries, but poverty is. Br. ACLU 5.

First, that deference merely provides a softer lens for examining claims that arise in the jail or prison settings; it does not alter the fundamental right at issue, which is determined by reference to the constitutional provision involved and the historical underpinnings of the right. *Wilson*, 501 U.S. at 300. Second, that deference is not absolute. Deference is not warranted, for example, if a plaintiff adduces substantial evidence that the officials have exaggerated their response to institutional security needs, *Pell*, 417 U.S. at 827—as in a case like this one in which five officers and a taser are employed to remove an isolated detainee's handcuffs. Thus the degree of deference is informed by the constitutional right at stake, and not vice-versa. For pretrial detainees, then, any "restrictions and limitations" on their rights must be justified by "the legitimate goals and policies of the penal institution," *Bell*, 441 U.S. at 545–46, not simply by the subjective whims of jailers. Even for convicted prisoners, deference to prison officials does not distort the substantive standard: it "does not insulate from review actions taken in bad faith and for no legitimate purpose." *Whitley*, 475 U.S. at 322.

In any event, deference to corrections officers is baked into the objective standard that is properly available to detainees. The objective test turns on the "facts and circumstances of each particular case," which include the fact that a use of force occurs in a correctional institution and that a detainee may pose "an immediate threat to the safety of the officers or others." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). Jurors are capable of factoring the special expertise of law enforcement officers into an objective analysis; indeed, an arrestee's excessive force claim already requires just that. *Id.* at 396–97 (requiring the

factfinder in an arrestee case to apply "the perspective of a reasonable officer on the scene" instead of 20/20 hindsight, accounting for police officers' "split-second judgments" in "tense, uncertain, and rapidly evolving" circumstances). Deference thus coexists with the objective reasonableness inquiry mandated by *Graham*, even in factual situations unfamiliar to most jurors and judges. See *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2021–22 (2014) (applying objective test to police officers' use of force in high-speed chase); *Scott* v. *Harris*, 550 U.S. 372, 383–84 (2007) (same). Factfinders are capable of applying the same test to detainees' claims, and thus the deference owed to jailers does not support any requirement of a subjective showing.

Respondents claim support from *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), but their reading is exactly backwards. Br. Resp'ts 30–31, 52. *Lewis* established only that unintentional conduct does not amount to a due process violation. There, the police officer in a high-speed chase was not operating his car with an "intent to harm suspects physically." *Lewis*, 523 U.S. at 854. In contrast, respondents cannot deny that they acted deliberately in using the taser, an instrument designed for the purpose of inflicting pain. Given this deliberate conduct that the officers knew would inflict pain, *Lewis*'s distinction between "deliberate indifference" and "conduct intended to injure," *id.* at 849, does not apply in this case, see Br. Pet'r 21 n.6—and respondents' fallback suggestion of a "deliberate indifference" test therefore makes no sense. Br. Resp'ts 34–37. Finally, contrary to respondents' suggestion, Br. Resp'ts 30–31, *Lewis* did not import *Whitley*'s subjective element as a requirement in all due process cases; it merely recognized that in some settings, "deliberate indifference

does not suffice." 523 U.S. at 852; see also *id.* at 857 (Kennedy, J., concurring) (noting the relevant due process inquiry is whether the "objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning").

Taken to its logical end, respondents' argument proves too much. If, as respondents suggest, the Fourth Amendment applies only to free persons and "the fact of incarceration" is determinative of everyone else's constitutional rights, anyone who is introduced into a jail may be subjected to a beating, so long as it was not sadistically and maliciously applied. Cf. *Graham*, 490 U.S. at 395 (analyzing excessive force claims of "free citizen[s]" under the Fourth Amendment reasonableness standard); see also, *e.g.*, *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996) (applying Fourth Amendment to excessive force claim of pre-*Gerstein* arrestee subjected to beating in jail cell); Br. Pet'r 30–31 n.10. Respondents' harsh standard would even apply to individuals who have not yet had their *Gerstein* hearings and prior to the government having demonstrated any authority to detain them. *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975).

Respondents additionally argue that this Court should treat pretrial detainees and convicted prisoners alike because Congress did so in the PLRA. Br. Resp'ts 21–22. But respondents recognize that the PLRA was not meant to define the scope of pretrial detainees' constitutional rights, but rather "to deter frivolous litigation against prison officials." *Id.* The PLRA, however, does assist in answering a different question: respondents' unfounded fears of a "flood of claims" from pretrial detainees under any standard short of the Eighth Amendment's. Br. Resp'ts 38.

The PLRA's prophylactic measures—its exhaustion and physical injury requirements, three-strikes rule, and limitations on filing and attorney's fees—have been extremely successful in reducing the volume of federal inmate litigation. 28 U.S.C. § 1915(b)-(g); 42 U.S.C. § 1997e(a)-(e); see also Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 160 (2015) (comparing the pre-PLRA filing rate of 24.6 claims per 1000 prisoners in 1995 to 10.2 in 2012). Any frivolous claim that slips past the PLRA's battlements would be put to rest by the protections of qualified immunity or the use of video recording technology, like the one used in the Monroe County Jail, that can help a judge swiftly dispose of a meritless case. See *Scott*, 550 U.S. at 380. Indeed, claims turning on objective standards are generally much more amenable to summary judgment than those containing subjective intent elements. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). There is no need to provide officers additional protection by distorting substantive legal standards.

B. This Court's Decision in *Bell* Does Not Require a Plaintiff to Show Any Subjective Mental State.

Respondents' argument also cannot be squared with *Bell*. *Bell* articulated a test, framed disjunctively, that provides alternative methods for pretrial detainees to prove a subjective due process deprivation: an expressed intent to punish; *or* an act not related to a legitimate government objective; *or* conduct excessive in relation to a legitimate purpose. Br. Pet'r 19–20; see also Br. U.S. 17. And the latter two methods are defined not by reference to punishment and intent, but rather by the action's purpose. Thus *Bell* stands for the proposition that a pretrial detainee

may prevail with objective evidence—by showing that the use of force is not "rationally [] connected" to a legitimate government purpose, or that the force was "excessive in relation to" its stated purpose. *Bell*, 441 U.S. at 538 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). As for the other method, although a pretrial detainee could instead show a due process deprivation with proof of "an expressed intent to punish," *id.* at 520, he is not required to do so in order to prevail.

Respondents zero in on the "expressed intent to punish" alone, arguing that the other two methods are mere proxies for the ultimate issue of jailers' subjective intent. Br. Resp'ts 25. Their position, however, simply does not square with *Bell*'s language, which speaks in terms of purpose and endorses objective showings. The two objective methods are *alternatives* and thus do not require any showing of an official's subjective intent. The Court in *Bell* applied its test in just this way: first noting that the challenged restrictions were concededly not employed "with an intent to punish," the Court then analyzed the claim under the objective methods. 441 U.S. at 561 ("Therefore, the determination whether these restrictions and practices constitute *punishment in the constitutional sense* depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose." (emphasis added)); see also *Rutherford*, 468 U.S. at 584 (*Bell*'s objective analysis applies "[a]bsent *proof* of intent to punish" (emphasis added)). As the Solicitor General explains, Br. U.S. 15, these textual clues from *Bell* show that "punishment in the constitutional sense" under the Fourteenth Amendment is wholly separate from subjective intent.

For this reason, *Bell*'s use of the term "punishment" to describe due process violations does not undermine the objective nature of this showing. Many government goals, such as retribution and rehabilitation, are legitimate with respect to treatment of convicted prisoners, but not as to pretrial detainees. A guard's action that is reasonably related only to retribution (and not to legitimate pretrial interests such as detention for trial), for example, may amount to "punishment" of a detainee regardless of the official's state of mind. A good example is the one this Court provided in *Bell*: "loading a detainee with chains and shackles and throwing him in a dungeon" is reasonably related only to retributive purposes, *Bell*, 441 U.S. at 539 n.20, so it can be described as "punishment" without any inquiry into the officer's mental state. Respondents' claim that the term "punishment" necessarily requires a subjective element is therefore incorrect.

C. Dicta in a Second Circuit Opinion Predating *Bell* Does Not Warrant a Subjective Intent Requirement.

Respondents rely on *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir. 1973), to support their argument that pretrial detainees and convicted prisoners are subject to the same test, but they ignore that this Court has never in the past forty years embraced that reading of *Johnson*. To the contrary, this Court has explicitly recognized the differences between these two categories of incarcerated individuals: "under the Due Process Clause, a detainee may not be punished" because a detainee, unlike a convicted prisoner, "has not been adjudged guilty of any crime." *Bell*, 441 U.S. 535–36; see *id.* at 537 ("This Court has recognized a distinction between punitive measures that may not consti-

tutionally be imposed prior to a determination of guilt and regulatory restraints that may.").

Indeed, respondents ignore the fact that *Johnson* was decided without the benefit of *Bell* and all this Court's intervening discussions of correctional facilities, excessive force claims, and due process rights.[4] Although Judge Friendly's opinion—written in the nascent stages of § 1983 litigation—was influential in establishing that § 1983 permits excessive force claims at all, this Court's jurisprudence has not stood still since then, and *Johnson*'s dicta has not kept pace with those developments. This Court in *Graham* warned against applying *Johnson* "indiscriminately" and unmoored from "any particular constitutional provision," and sharply rejected the conclusion respondents draw from *Johnson*: the "notion that all excessive force claims brought under § 1983 are governed by a single generic standard." *Graham*, 490 U.S. at 393.

This Court in *Whitley* extracted the "malicious and sadistic" factor from the *Johnson* test in defining the type of "'unnecessary and wanton infliction of pain'" that "'constitutes cruel and unusual punishment forbidden by the Eighth Amendment,'" but that interpretation has no implications for a pretrial detainee's due process rights. 475 U.S. at 319 (quoting *Ingraham*, 430 U.S. at 670). Indeed, were respondents' reading of *Whitley* correct, this Court surely would have applied *Johnson*'s language to the due process claim in that case as well as the Eighth Amendment

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[4] Moreover, even on its own terms, *Johnson* had no occasion to address whether a subjective showing is required. Because the opinion reversed the dismissal of a complaint that described an unprovoked assault and presented ample allegations of bad faith, 418 F.2d at 1029-30, *Johnson* did not consider whether a purely objective showing could suffice to prove liability.

claim. *Whitley*, 475 U.S. at 326–28. It did not. Instead, this Court simply stated that the Eighth Amendment is "the primary source of substantive protection to convicted prisoners" in excessive force cases, and expressly limited its holding to "prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty." *Id.* at 327.

II. THE FOURTH AMENDMENT APPLIES TO MR. KINGSLEY'S EXCESSIVE FORCE CLAIM.

Respondents make two principal arguments in response to Mr. Kingsley's Fourth Amendment claim: first, that the claim is forfeited; and second, that the use of objectively unreasonable force against a pretrial detainee is not a new seizure in light of his lawful incarceration.[5] Respondents are wrong on both counts.

First, Mr. Kingsley has maintained throughout this litigation that the Fourth Amendment's objective test governs his excessive force claim. Moreover, he has relied on cases applying the Fourth Amendment's objective standard to pretrial detainees' excessive force claims, and cited the courts of appeals' division on that question, Pet. 11–13; see also Kingsley's Pet. For Reh'g En Banc, 6 & n.2, 8, 10. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); see also *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374,

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[5] Respondents (and the United States) also note that this Court has not accepted a continuing seizure theory for pretrial detainees. Br. Resp'ts 53; Br. U.S. 21. Mr. Kingsley never asserted that it had, but simply pointed out that some members of this Court had cited it with approval. *See* Br. Pet'r 29.

378 (1995) (considering an argument "expressly disavowed" below). On this record, Mr. Kingsley may make arguments in support of a Fourth Amendment claim.

Respondents then offer three additional reasons why objectively unreasonable force against a pretrial detainee cannot be deemed an illegal seizure under the Fourth Amendment. First, again relying on *Lewis*, respondents assert that an objective reasonableness test would amount to a negligence standard under the Fourteenth Amendment. Br. Resp'ts 16, 45–46. But for the reasons discussed above, see *supra* pp. 8–9, *Lewis* addresses the distinction between intentional and accidental acts, a question not at issue here given the officers' deliberate actions. Second, they label the theory "novel." Br. Resp'ts 54; see also Br. U.S. 22. Novelty, however, is not a reason to reject a theory that flows inexorably from this Court's cases addressing the meaning of the word "seizure." See Br. Resp'ts 30–31.

Finally, respondents rely on this Court's cases holding that the Fourth Amendment is inapplicable to *cell searches* of lawfully incarcerated persons—both convicted persons (*Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984)) and pretrial detainees (*Bell*, 441 U.S. at 556). Br. Resp'ts 54–55. Those cases do not govern the wholly separate question whether the Fourth Amendment applies to claims that excessive force has been used against a pretrial detainee. In *Bell*, this Court weighed the government's legitimate interests in placing restrictions on pretrial detainees against the individual's interest in *privacy*. 441 U.S. at 544–48, 555–60. Here, the balancing process yields a different outcome: the government's legitimate interests are balanced *not* against the individual's interest in privacy but against his interest in "bodily integrity,"

or freedom from an officer's use of objectively unreasonable force. *Tennessee* v. *Garner*, 471 U.S. 1, 7–8 (1985). Lawful incarceration cannot provide a basis for eliminating a pretrial detainee's undisputed interest in freedom from the use of objectively unreasonable physical force.

Respondents argue that this reading will open the litigation floodgates because prisoners will characterize every restriction on movement as a new seizure. But this Court's balancing test, as described in *Bell* and *Graham*, will weed out claims based on simple restrictions on the movements of lawfully incarcerated persons like they resolve claims based on privacy interests—that is, the government's interests will generally outweigh the prisoners' interests. The outcome of the balancing test differs when the prisoner is a pretrial detainee claiming an objectively unreasonable use of force.

Moreover, respondents' floodgates argument ignores the evident distinction between the routine restrictions of incarceration and the use of excessive force. Just as incarceration is not equivalent to *Miranda* custody (and thus is not inherently coercive), see *Maryland* v. *Shatzer*, 130 S. Ct. 1213, 1224–25 (2010), incarceration also is not equivalent to the kind of seizure resulting from the government's use of excessive force. Cf. *Sandin*, 515 U.S. at 484 (conditions of incarceration can violate the Due Process Clause "of [their] own force" or when the State "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life").

Finally, respondents contend that Mr. Kingsley's argument cannot logically be cabined to pretrial detainees. But there again respondents rely on the incorrect premise that the government must be allowed to treat *all* lawfully incarcerated persons—pretrial

detainees and convicted prisoners—the same way. As noted above, it is a "prisoner's conviction" that "entitles the State to classify him as a 'criminal'" and punish him. *Ingraham*, 430 U.S. at 669. A pretrial detainee has not been convicted of a crime—indeed, may be guilty of nothing more than an inability to make bail. That is an entirely legitimate basis on which to distinguish the standard of proof for his claims of excessive force from the standard governing the analogous claim of a convicted person subject to punishment under the Constitution.

III. RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Even had respondents preserved the argument that they are entitled to qualified immunity, which they did not,[6] that argument lacks merit. Notably,

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[6] Respondents failed to preserve their argument for two reasons. First, respondents' objections in the district court, D. Ct. Doc. 28, at 18–22; D. Ct. Doc. 158, at 83–85, and the conclusory footnote in respondents' brief in opposition to certiorari, Br. Opp'n 17 n.1, are insufficient to preserve the issue—particularly because they fail to spell out respondents' newest argument, Br. Resp'ts 56, that *any* clarification of the required mental state would entitle them to qualified immunity. That failure prevented the district judge and jury from making any findings that might be necessary to that determination. Second, respondents failed to cross-appeal, as a party must when seeking to enlarge his own rights under a judgment. *Jennings* v. *Stephens*, 135 S. Ct. 793, 798 (2015). A ruling of qualified immunity provides additional rights to a government official, such as exemption from "the costs of trial" and "the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18; *see also Camreta* v. *Greene*, 131 S. Ct. 2020, 2030 (2011) (describing qualified immunity's presence in "a special category" regarding "review of appeals brought by winners"). A government actor who prevails on the merits thus must cross-appeal a denial of qualified immunity to preserve that claim. *See, e.g.*, *Peterson* v. *Wilson*, 141 F.3d 573,

respondents limit their qualified immunity challenge in this Court to the application of the Fourth Amendment. Br. Resp'ts 55–56 (arguing that qualified immunity would apply "[e]ven if this Court were to adopt a Fourth Amendment objective reasonableness standard").[7] Thus, respondents apparently concede that the officers would not have qualified immunity under *Bell*'s due process standard.

And for good reason. Qualified immunity "generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 818–19). But it was clearly established in 2010 that respondents' use of force was objectively unreasonable. This Court explained in *Graham* that the objective reasonableness test turns on "the facts and circumstances of each particular case," including whether the target of the force "poses an immediate threat to the safety of the officers or others, and whether he is actively resisting" the officers. 490 U.S. at 396. Mr. Kingsley denied resisting removal of the handcuffs, and given that he was at the time face-down on a slab concrete bunk, any resistance he showed could not have been of the "active" variety that would insulate the officers' actions. See J.A. 45 (district court observing that, in

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579 n.21 (5th Cir. 1998); *Gulliford* v. *Pierce Cnty.*, 136 F.3d 1345, 1351 (9th Cir. 1998).

[7] To the extent respondents characterize Mr. Kingsley's position as equating the Fourth Amendment and Due Process tests, they are mistaken. Mr. Kingsley distinguished the *Bell* test from the Fourth Amendment analysis, Br. Pet'r 28–29, and made clear that the tests are separate and motivated by different considerations, even if the end result is the same, Br. Pet'r 13. The United States agrees. Br. U.S. 20.

video of the incident, Mr. Kingsley "does not appear to be moving his body around aggressively or very much at all"). Thus, the use of force was objectively unreasonable under then-existing law. See, *e.g.*, *Lewis* v. *Downey*, 581 F.3d 467, 478 (7th Cir. 2009) (unprovoked use of taser violated pretrial detainee's constitutional rights); *Titran* v. *Ackman*, 893 F.2d 145, 148 (7th Cir. 1990) ("If the officers intentionally restrained, jolted, and roughed up [a detainee] without physical provocation from her, their behavior was unreasonable.").

Respondents nevertheless argue that qualified immunity should apply "[i]f this Court adopts an objective reasonableness test" because the Seventh Circuit also required a subjective showing at the time of the incident.[8] Br. Resp'ts 56. But such an application—under either the Fourth or Fourteenth Amendment—would be inconsistent with the purpose of qualified immunity. Qualified immunity protects officers who make a calculated decision to use force; it "'operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Pearson* v. *Callahan*, 129 S. Ct. 808 (2009) (quoting *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002)). Respondents would not be entitled to qualified immunity, even if it were not "clearly established" that subjective good faith

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[8] Notably, the Seventh Circuit's pattern jury instructions, which represent a considered effort by a committee of judges, scholars, and practitioners to capture the current state of the law, do *not* incorporate any subjective intent requirement into the excessive-force elements instructions governing pretrial detainees' claims. *See Federal Civil Jury Instructions of the Seventh Circuit* (2009), Pattern Instructions 7.08-7.09, *quoted in* J.A. 326-31 (opinion below) (Hamilton, J., dissenting). Those instructions require a purely objective analysis. *Id.*, *quoted in* J.A. 329 ("[Y]ou must not consider whether Defendant's intentions were good or bad.").

cannot insulate them from a pretrial detainee's excessive force claim. The guards made a calculated decision to use the taser; that decision could not have been in good faith because that kind of force under the circumstances had been clearly established to be objectively unreasonable. Once respondents were "on notice" that their conduct was objectively unreasonable as a matter of law, as it was here, their actions could not have been changed by further "notice" of the role that their mental state would or would not play in a subsequent excessive force analysis. Thus, qualified immunity is inappropriate here.

IV. THE JURY INSTRUCTIONS IMPROPERLY REQUIRED MR. KINGSLEY TO PROVE THE OFFICERS' SUBJECTIVE INTENT.

The Solicitor General correctly interprets *Bell*'s due process standard, Br. U.S. 12–19, 23–28, but approves the jury instructions here, though they include the very subjective intent requirement that he declares erroneous, and though he agrees they should not be used in the future. Br. U.S. 31. The Solicitor General is mistaken in his contention that the instructions were adequate; as given, they permitted the jury to find that the force was objectively unreasonable, and yet still rule for defendants.

The text of the instructions amply demonstrates this incongruity. Subparagraph (2) of the instruction clearly articulates the requisite objective unreasonableness requirement. J.A. 278. Thus, subparagraph (3), although it likewise recites some reasonableness language, must be serving an additional purpose; otherwise it would be redundant of subparagraph (2). *Id.* The additional purpose of (3) is clear from its other language, which requires the plaintiff to prove an additional subjective requirement: that defendants "recklessly disregarded plaintiff's safety." *Id.*; see also

Farmer v. *Brennan*, 511 U.S. 825, 839 (1994) (noting that recklessness often means that "a person must 'consciously disregar[d]' a substantial risk of serious harm" (quoting Model Penal Code § 2.02(2)(c))). That confusion is compounded by the instructions' two other references to recklessness, which similarly described it as an additional requirement separate from objective reasonableness. J.A. 277 ("Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time."); J.A. 278 (asking whether "defendants used unreasonable force and acted with reckless disregard of plaintiff's rights"). As the dissent below explained, J.A. 318–21 (Hamilton, J., dissenting), each of these mentions could have confused the jury; their combined impact could not be harmless.

The instructions' misstatement of the governing law requires reversal because "a reasonable juror could well have been misled by the instruction given." *Sandstrom* v. *Montana*, 442 U.S. 510, 517 (1979).[9] Review of jury instructions requires "careful attention to the words actually spoken to the jury," *id.* at 514, and "potentially offending words must be considered in the context of the charge as a whole." *Francis* v. *Franklin*, 471 U.S. 307, 315 (1985). Here, the very inclusion of a recklessness requirement in the instructions, as well as the context indicating that that requirement was in addition to an objective showing,

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[9] Relying only on circuit precedent, the Solicitor General cites a different standard. Br. U.S. 28–29 (citing *Westchester Fire Ins. Co.* v. *Gen. Star Indem. Co.*, 183 F.3d 578, 585 (7th Cir. 1999)). This Court need not endorse that standard, which differs from other tests stated by the court of appeals, *see, e.g.*, *Huff* v. *Sheahan*, 493 F.3d 893, 899 (7th Cir. 2007); but the district court's error satisfies the Solicitor General's cited standard as well.

wrongly invited the jury to assess the officers' mental state. Given the difficulty of proving a culpable subjective intent—both in this case and in general—when a defendant disputes that mental state, the legal error in the instructions seriously prejudiced Mr. Kingsley.

CONCLUSION

For the reasons given above, the decision below should be reversed.

Respectfully submitted,

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MICHAEL B. KINGSLEY, PETITIONER

v.

STAN HENDRICKSON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. 1983 excessive-force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

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In the Supreme Court of the United States

No. 14-6368

MICHAEL B. KINGSLEY, PETITIONER

v.

STAN HENDRICKSON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case concerns the requirements for establishing that an officer's use of force against a pretrial detainee violated the Constitution. The United States detains individuals awaiting criminal prosecutions. At the same time, the United States prosecutes law-enforcement officers who violate the civil rights of pretrial detainees, see 18 U.S.C. 242, and brings civil actions to address the use of excessive force against such detainees, see 42 U.S.C. 1997a, 14141. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. In April 2010, petitioner was placed into detention in the Monroe County Jail in Sparta, Wisconsin, pending his trial on a drug charge. Pet. App. 2a;

D. Ct. Doc. 157, at 43-44 (Nov. 5, 2012). On May 20, 2010, an officer was performing a cell check when he noticed a piece of paper covering a light fixture above petitioner's bed. Pet. App. 3a. The officer told petitioner to remove the paper, but petitioner refused. *Ibid.* Throughout the course of the evening and the following morning, petitioner continued to refuse multiple orders from different officers to remove the paper, including orders from Lieutenant Robert Conroy, the administrator of the jail. *Ibid.*

Lieutenant Conroy ultimately told petitioner that the officers would remove the paper, but that petitioner would have to be removed from the cell and would face disciplinary action. Pet. App. 3a. Lieutenant Conroy and four officers, including respondents, then approached the cell. *Id.* at 4a. When petitioner refused to voluntarily exit, the officers stood him up and handcuffed him. *Ibid.* Petitioner would not voluntarily walk out of the cell, claiming that his foot was in pain. *Ibid.* The officers therefore carried him to a "receiving cell," where they placed him facedown on a concrete cell bunk. *Ibid.*

The events that occurred in the receiving cell are captured in a video in the record, but the officers' bodies largely obstructed the view of the camera. Pet. App. 4a n.3. According to the officers, petitioner physically resisted their efforts to remove his handcuffs (a safety precaution when leaving an inmate alone in a cell). *Id.* at 4a-5a; J.A. 174. Respondent Hendrickson put his knee on petitioner's back, and petitioner responded by telling him, in saltier terms, to stop. Pet. App. 5a. In the courts below, but not in this Court, petitioner claimed that the officers then slammed his head into the concrete bunk. *Id.* at 5a,

58a, 61a, 63a-64a. According to the officers, respondent Degner told petitioner that if he continued to resist, Degner would stun him with a taser. *Id.* at 58a. When petitioner still refused to comply, Hendrickson ordered Degner to stun petitioner. *Id.* at 5a n.4. Degner stunned petitioner in the back for five seconds. *Id.* at 5a. At that point, Lieutenant Conroy ordered the officers to leave the cell. *Ibid.*

Fifteen minutes later, officers returned to the cell, and petitioner allowed them to remove his handcuffs. Pet. App. 5a. The officers placed petitioner on a medical watch. *Ibid.* A nurse came by shortly after, but petitioner refused to allow her to attend to him. *Id.* at 5a, 59a.

2. Petitioner filed a pro se complaint against respondents and other officers under 42 U.S.C. 1983 and state law in the United States District Court for the Western District of Wisconsin. Pet. App. 6a & n.6. As relevant here, he alleged that they had violated the Due Process Clause of the Fourteenth Amendment by using excessive force against him in the receiving cell. *Id.* at 6a.

a. The district court denied cross-motions for summary judgment on the excessive-force claim after identifying "a genuine dispute of material fact regarding whether [the officers] used excessive force against [petitioner] once he was in the receiving cell" by "slamm[ing] [his] head into the concrete bed and us[ing] a taser against him solely for the purpose of causing him harm." Pet. App. 63a; see *id.* at 53a. The court found that a "jury could conclude that because [petitioner] was not resisting and posed no safety threat at the time [the officers] slammed his head and used the taser against him, [their] use of force was

disproportionate to the situation" or that the officers "made no efforts to temper the severity of the force and * * * intended to harm [petitioner]." *Id.* at 64a. The district court also denied the officers' request for qualified immunity. *Id.* at 66a-67a. The court stated that "a reasonable jury could conclude that [the officers] acted with malice and intended to harm [petitioner] when they used force against him." *Ibid.*

b. The parties stipulated to the dismissal of all claims except the excessive-force claim against Hendrickson and Degner (respondents here). Pet. App. 7a. With petitioner represented by appointed counsel, the case proceeded to trial. *Ibid.* Over three days, the jury heard testimony from petitioner, respondents, other officers, and expert witnesses. See D. Ct. Docs. 154-158 (Nov. 5, 2012).

c. The parties proposed different jury instructions for the definition of unconstitutionally excessive force. Petitioner proposed an instruction that would have asked the jury only "whether each individual [respondent's] use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that [each respondent] faced," without regard to whether the officer's "intentions were good or bad." J.A. 78 (emphasis omitted); see J.A. 76-77. That proposal mirrored the Fourth Amendment standard that this Court has recognized for claims of excessive force in arrest situations. See, *e.g.*, *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2020 (2014).

Respondents proposed an instruction that would have required the jury to find that the force they had used against petitioner was "not applied in a good faith effort to maintain or restore discipline, but was

instead applied maliciously or sadistically for the very purpose of causing harm." J.A. 65. That is the standard that this Court has recognized under the Eighth Amendment for claims of excessive force brought by prisoners serving criminal sentences. See *Farmer* v. *Brennan*, 511 U.S. 825, 835-836 (1994).

The district court gave an instruction that differed from both of the proposed instructions. See J.A. 277-278; D. Ct. Doc. 156, at 153-154. The instruction stated that "[e]xcessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time." J.A. 277. "Thus," the court said, petitioner was required to "prove each of the following factors": (i) respondents used force on him; (ii) that "use of force was unreasonable in light of the facts and circumstances at the time"; (iii) respondents "knew that using force presented a risk of harm to [petitioner], but they recklessly disregarded [petitioner's] safety by failing to take reasonable measures to minimize the risk of harm to [petitioner]"; and (iv) the use of force caused some harm to petitioner. J.A. 277-278.

The court further instructed the jury that "[i]n deciding whether one or more [respondents] used 'unreasonable' force against [petitioner], you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that [respondents] faced." J.A. 278. The court added that "in deciding whether one or more [respondents] used unreasonable force and acted with reckless disregard of [petitioner's] rights," the jury could "consider such factors as: [t]he need to use force; [t]he relationship between the need to use force and the amount of force used; [t]he extent of [petition-

er's] injury; [w]hether [respondents] reasonably believed there was a threat to the safety of staff or prisoners; and [a]ny efforts made by [respondents] to limit the amount of force used." *Ibid.*

Petitioner preserved an objection to the portion of that instruction stating that the jury would have to find that respondents had "recklessly disregarded [petitioner's] safety by failing to take reasonable measures to minimize the risk of harm" to petitioner. J.A. 231; see J.A. 228-231. He argued that the phrase was "confusing in the context of an excessive force case where [respondents] were deliberately applying force." J.A. 231. Petitioner also objected to the instruction requiring proof of harm (although he has not pressed that objection in this Court). J.A. 233-234.

d. The jury entered a verdict in favor of respondents. J.A. 284.

3. The court of appeals affirmed. Pet. App. 1a-26a. As relevant here, the court rejected petitioner's argument that the district court had "conflated the standards for excessive force under the Eighth and Fourteenth Amendments and, as a result, wrongly instructed the jury to consider the subjective intent of [respondents]." *Id.* at 2a.

a. The court of appeals began by explaining that the Fourth and Eighth Amendments protect arrestees and convicted prisoners, respectively, from excessive force by law-enforcement officers, but that "[b]etween the status of arrestee and sentenced prisoner is the intermediate status of the detainee," who "is entitled to protection from physically abusive government conduct" under the Due Process Clause of the Fourteenth Amendment. Pet. App. 11a. The court accordingly analyzed the instructions under due-process stand-

ards, relying on this Court's decision in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), as its "primary touchstone." Pet. App. 12a. Under *Bell*, the court of appeals explained, "'the proper inquiry' is whether the treatment of the detainee 'amount[s] to punishment,'" which may not be imposed on an individual before he has been convicted and sentenced. *Ibid.* (brackets in original) (quoting *Bell*, 441 U.S. at 535). The court contrasted that standard with the Eighth Amendment's narrower proscription only on "cruel and unusual" punishments, and thus concluded that "the protection afforded by the Due Process Clause" from the use of force "is broader than that afforded under the Eighth Amendment." *Ibid.*

The court of appeals then held, again relying on *Bell*, that to determine whether a given action constituted forbidden "punishment," a court must ask "whether [the] action was taken 'for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.'" Pet. App. 13a (quoting *Bell*, 441 U.S. at 538). That standard of liability, the court said, could not be satisfied by negligent governmental conduct, *ibid.* (citing *Daniels* v. *Williams*, 474 U.S. 327, 334 (1986)), but it could be satisfied by recklessness, which, the court said, "incorporates some measure of subjective intent," *ibid.* The court of appeals cited circuit precedent approving instructions that required a plaintiff to prove that the defendants "acted deliberately or with callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights." Pet. App. 16a-17a (citation omitted); cf. *id.* at 17a (pertinent inquiry is whether officers acted "maliciously and sadistically for the very purpose of causing

harm"). The court noted that its cases "recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny." *Id.* at 18a. Such a standard "stands in contrast," the court continued, "to the rule under the Fourth Amendment that focuses only on whether the government conduct was '*objectively* reasonable' in light of all of the facts and circumstances." *Id.* at 13a-14a (quoting *Graham* v. *Connor*, 490 U.S. 386, 397 (1989)).

Applying its understanding of the *Bell* due-process standard, the court of appeals held that the jury instructions were "sufficiently precise in [their] description of the due process right of a pretrial detainee to ensure that [petitioner's] case was fairly presented to the jury." Pet. App. 15a; see *id.* at 19a-22a. Petitioner had argued on appeal that "the instructions were erroneous and confusing because he was required to establish that the officers had acted with 'reckless disregard' for his safety, when the instruction should have allowed the jury to find the existence of punishment on the basis of wholly objective factors." *Id.* at 21a. But the court rejected that argument on the ground that "the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases," and that the instructions had told the jury to measure recklessness "largely by the objective factors" that the district court had enumerated. *Id.* at 21a-22a. The court of appeals further explained that in light of the overall context of the instructions, the district court's three references to recklessness indicated only that to be held liable, respondents must have (i) acted more than negligently ("i.e., the taser did not go 'off by acci-

dent'"), (ii) "'failed to take reasonable measures to minimize harm to [petitioner],'" and (iii) otherwise behaved unreasonably in light of "objective considerations." *Id.* at 22a n.20 (quoting jury instructions).

b. Judge Hamilton dissented. Pet. App. 27a-42a. He argued that "[i]f a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was 'punished' without due process of law." *Id.* at 27a. In his view, the district court had erred by "add[ing] an unnecessary and confusing element of 'reckless' conduct or purpose to the required elements of [petitioner's] claim." *Ibid.*; see *id.* at 34a-37a.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed. Petitioner is correct (Br. 11) that a pretrial detainee is not required to prove that an officer acted with a "bad mental state" to prevail on an excessive-force claim. However, the district court's instructions, although not a model of clarity, are most fairly read not to include such a mental-state element.

A. Under the Due Process Clause, a person who has been detained pending trial after a judicial finding of probable cause may not be subjected to "punishment." *United States* v. *Salerno*, 481 U.S. 739, 746 (1987); see *id.* at 746-752. This Court has held that a general restriction imposed on pretrial detainees constitutes "punishment" in the relevant sense if (i) prison officials impose it with the intent to achieve a punitive objective, such as deterrence or retribution, or (ii) the restriction is not reasonably related to a legitimate nonpunitive objective, such as prison security and discipline, or is unreasonably disproportionate to such an objective. *Bell* v. *Wolfish*, 441 U.S. 520, 535-

539 & n.20, 540 & n.23, 561 (1979). The same standard should apply to an officer's use of force against a pretrial detainee, with appropriate sensitivity to the difficult judgment calls that officers often must make when inmates resist their orders or threaten violence.

B. The due-process excessive-force standard for pretrial detainees differs in certain respects from the Fourth Amendment standard for arrestees and the Eighth Amendment standard for convicted prisoners. But those differences are attributable to the different text and purposes of the constitutional provisions and the different stages in the criminal-justice process at which they apply. In litigation, those differences can be substantial, as the Eighth Amendment's intent requirement poses a significant barrier to liability. However, for individual officers working with a prison population comprising both pretrial detainees and convicted prisoners, the practical problems should not be substantial. In all cases, an officer who makes a reasonable decision to use a proportionate level of force in the service of a legitimate governmental objective—such as effecting a lawful arrest, protecting the public, ensuring the safety of prisoners and guards, or enforcing legitimate discipline—complies with the Constitution. And qualified immunity protects from liability an officer who reasonably believes that her actions are lawful.

C. The jury instructions in this case required the jury to hold respondents liable if it found that respondents had used force against petitioner unreasonably in light of objective factors. Fairly read, those instructions did not, as petitioner contends, include an erroneous "bad mental state" element. Although the excessive-force instruction used a variant of "reck-

less" in three places, the instruction is best read to equate recklessness with "failing to take reasonable measures to minimize the risk of harm to [petitioner]" and otherwise acting unreasonably in light of objective considerations, J.A. 278, not with a "bad mental state," such as a malicious or punitive purpose.

ARGUMENT

TO SUCCEED ON AN EXCESSIVE-FORCE CLAIM, A PRETRIAL DETAINEE IS NOT REQUIRED TO PROVE THAT THE DEFENDANT ACTED WITH A PARTICULAR SUBJECTIVE MENTAL STATE

An individual is subject to the use of force by law-enforcement officers at various stages of the criminal-justice process. When an officer has probable cause to believe that a person has committed a crime, she may arrest him. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001). The Fourth Amendment permits the officer to use a reasonable level of force to effect that arrest and to ensure the safety of herself, fellow officers, and other citizens. *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2020-2022 (2014). The Fourth Amendment and the Due Process Clause of the Fourteenth (or Fifth) Amendment then permit the government to detain the arrestee pending a guilty plea or trial if a magistrate finds probable cause and denies bail. See *United States* v. *Salerno*, 481 U.S. 739, 746-752 (1987); *Gerstein* v. *Pugh*, 420 U.S. 103, 126 (1975). Within the pretrial-detention facility, officers will often be required to use force or the threat of force to maintain order and to ensure the safety of officers and detainees. Finally, after a defendant has been convicted and sentenced to a term of imprisonment, the government may incarcerate him in a facility where officers may use force not only to maintain order and safety, but

also to advance legitimate penological goals, subject to the limits imposed by the Eighth Amendment's proscription on "cruel and unusual punishments." See *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987).

This case concerns the constitutional limits on officers' use of force during the pretrial-detention phase. This Court has made clear that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham* v. *Connor*, 490 U.S. 386, 395 n.10 (1989). Petitioner is correct (Br. 12, 15-27) that a pretrial detainee can establish a due-process violation by showing either that the officer bore the subjective intent to inflict punishment *or* that the level of force employed had no reasonable relation to a legitimate nonpunitive objective, like prison safety and discipline. But petitioner errs in contending (Br. 11, 13) that the jury instructions in this case, fairly read, misled the jury that petitioner was required to prove a "bad mental state" element.[1]

A. The Due Process Clause Prohibits Prison Officials From Using Force That Amounts To Punishment Against A Pretrial Detainee

1. a. Under the Due Process Clause, a person "may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). The government, how-

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[1] Respondents have preserved an argument that they are entitled to qualified immunity even if the instructions were erroneous, an issue that the court of appeals did not reach. See Br. in Opp. 17 n.1; Resps. C.A. Br. 28-29. Were this Court to conclude that the instructions were erroneous, it would be appropriate to remand to the court of appeals for resolution of that case-specific question in the first instance.

ever, may detain a criminal defendant pending trial in certain circumstances, such as where he cannot make bail or poses a risk of future dangerousness, because such detention is "regulatory, not penal" in character. *Salerno*, 481 U.S. at 746; see *Bell*, 441 U.S. at 536. During the course of that detention, the government "may subject [the detainee] to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment or otherwise violate the Constitution." *Bell*, 441 U.S. at 536-537.

In *Bell*, this Court set out the framework for distinguishing "between punitive measures that may not constitutionally be imposed [on a detainee] prior to a determination of guilt and regulatory restraints that may." 441 U.S. at 537. "A court," *Bell* explained, "must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538. Thus, to prove a due-process violation, a plaintiff must establish a particularized form of intent: that jail officials acted with the *purpose* of achieving a punitive objective, such as "[r]etribution [or] deterrence," rather than a "legitimate nonpunitive governmental objective[]," *id.* at 539 n.20, such as "[e]nsuring security and order at the institution," *id.* at 561.

Bell further held that a plaintiff can establish that unlawful purpose in one of two ways. First, the purpose requirement is met if a plaintiff proves "an expressed intent to punish on the part of detention facility officials." 441 U.S. at 538; see *id.* at 539 n.20, 561. Second, absent proof of such an expressed intent, the "determination generally will turn on 'whether an alternative purpose to which [the challenged practice]

may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.* at 538 (second set of brackets in original) (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)).

The inquiry under the second alternative is an objective one. If the challenged practice "is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment,'" and therefore does not violate due process. *Bell*, 441 U.S. at 539. "Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment." *Ibid.* In conducting that inquiry, a court must also ask whether there exist "many alternative and less harsh methods" of achieving the same nonpunitive objective. *Id.* at 539 n.20. For example, although "loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution," such extreme conditions would nevertheless "support a conclusion that the purpose for which they were imposed was to punish." *Ibid.*

Bell applied its framework to a number of challenged security practices in a federal detention facility, including body-cavity searches and unannounced cell searches. See 441 U.S. at 544-562. Because the officials had no "intent to punish the pretrial detainees housed there," the Court evaluated whether the practices were "rationally related to a legitimate nonpunitive governmental purpose and whether they appear[ed] excessive in relation to that purpose." *Id.* at 561. Under that standard, the Court concluded that

the plaintiffs "simply ha[d] not met their heavy burden of showing that these officials have exaggerated their response to the genuine security considerations" that prompted the practices. *Id.* at 561-562; see *Block* v. *Rutherford*, 468 U.S. 576, 583-591 (1984) (applying *Bell* standard to security practices for pretrial detainees); *Schall* v. *Martin*, 467 U.S. 253, 269-271 (1984) (applying *Bell* standard to conditions of pretrial detention for juveniles).

b. Neither *Bell* nor this Court's subsequent decisions applying its standard have been perfectly clear as to whether the second, objective prong reflects an independent *legal* basis for classifying governmental action as punitive or instead describes only the sort of evidence from which a factfinder may infer that a given action was *in fact* motivated by a punitive intent. The former view, however, is the better reading of the decisions. *Bell* stated that the "court" (rather than the "jury" or "factfinder") would draw the inference of punitive intent from the lack of any reasonable and proportionate connection between the restriction and a nonpunitive objective. 441 U.S. at 538-539. It also held that "arbitrary or purposeless" restrictions would be unconstitutional, *id.* at 539, suggesting that if prison officials had no discernible purpose whatsoever in implementing a restriction, the restriction could violate due process. And in *Block*, the Court stated that *Bell*'s objective analysis applies "[a]bsent *proof* of intent to punish," 468 U.S. at 584 (emphasis added), indicating that the objective analysis does not constitute mere proof of an officer's actual mental state.

The *Bell* objective test thus resembles other situations when the law holds that a particular purpose

must be imputed to a challenged action based on objective circumstances. See, *e.g.*, *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1156 (2011) ("To determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency, * * * we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.") (citation and internal quotation marks omitted); cf. *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2068-2069 (2011) (explaining that the criminal law often equates willful blindness with knowledge or purpose). And it accords with this Court's broader due-process jurisprudence, in which the Court has typically evaluated governmental action objectively. See Pet. Br. 24.

2. *Bell* set out the standard for impermissible "punishment" in the context of claims challenging conditions of confinement and general prison security practices, not the use of force against a detainee. But this Court later stated, citing *Bell*, that it "is clear * * * that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395 n.10 (citing 441 U.S. at 535-539). And this Court has indicated that the *Bell* standard represents a general definition of what sort of governmental action constitutes "punishment" that is "*per se* illegitimate" when "imposed without a prior adjudication of guilt." *Schall*, 467 U.S. at 272; see *Salerno*, 481 U.S. at 747-748 (applying standard to Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*); *Kennedy*, 372 U.S. at 168-169 (applying standard to forfeiture-of-citizenship statute) (relied on by *Bell*, 441 U.S. at 537-539 & n.20). For that reason, the *Bell* standard is not limited to the

particular governmental practices at issue in *Bell* itself.

Accordingly, the *Bell* standard supplies the appropriate test for evaluating the constitutionality of the use of force against pretrial detainees. A challenged use of force should therefore be held to violate the Due Process Clause when either (i) there was "an expressed intent to punish on the part of [the] detention facility officials" who used the force, *i.e.*, to achieve punitive objectives like deterrence, retribution, or chastisement; or (ii) the use of force was "not reasonably related to a legitimate goal," such as the safety of officers and inmates or appropriate prison discipline, or was unreasonably disproportionate in respect to such an objective. *Bell*, 441 U.S. at 538-539.

That standard provides a workable test to guide an officer's decisionmaking in situations where she must choose whether to use force to ensure the security of a detention facility or to enforce her commands. Both law-enforcement organizations and courts have ample experience in assessing the lawfulness of the use of force in light of the objective circumstances known to the officer at the time, because a similar inquiry is required by the Fourth Amendment in the arrest context. See pp. 22-23, *infra*.

There are, to be sure, critical differences between general restrictions and security practices established as prison policy and the quick judgment calls that officers make when deciding whether to use force against a pretrial detainee. Officers can be called upon to use force "in haste, under pressure, and frequently without the luxury of a second chance." *Hudson* v. *McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986)). That concern,

however, does not warrant a different constitutional standard for excessive-force claims. Cf. p. 26, *infra*. Instead, courts should apply the *Bell* standard with appropriate sensitivity to the volatile conditions under which officers must make decisions about whether to use force, as they do with Fourth Amendment claims. See, *e.g.*, *Plumhoff*, 134 S. Ct. at 2020-2022. In addition, as petitioner recognizes (Br. 26), a court must always evaluate the use of force in light of the "facts known [to the officer] at the time, not hindsight." See *Graham*, 490 U.S. at 397. And as with any claim challenging the actions of officials who serve in detention facilities, courts must keep in mind that "[r]unning a prison is an inordinately difficult undertaking," *Turner* v. *Safley*, 482 U.S. 78, 84-85 (1987), and that "safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face," *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1515 (2012). See *Block*, 468 U.S. at 584-585, 588; *Hudson* v. *Palmer*, 468 U.S. 517, 526-527 (1984); *Bell*, 441 U.S. at 540 n.23, 547-548 & n.29; accord Pet. Br. 22.

3. In the decision below, the court of appeals correctly recognized that under *Bell*, "[w]e must ask whether a particular action was taken 'for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose,'" Pet. App. 13a (quoting *Bell*, 441 U.S. at 538), and the court concluded that "the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases," *id.* at 21a. But in discussing recklessness, the court cited precedents both for the proposition that reckless (but not negligent) govern-

mental action can violate the Due Process Clause, see *id.* at 13a-14a, and for the proposition that the requisite intent can be shown either by "an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights," *id.* at 16a-17a (citation omitted; brackets in original).

That analysis was unnecessarily confusing. The court of appeals conflated two different types of intent relevant to a due-process claim: the intent to commit the act that caused harm, and the intent to achieve a particular purpose. See Pet. App. 37a-41a (Hamilton, J., dissenting). This case does not involve any dispute over the first type of intent—as it would if, for example, respondents claimed to have accidentally stunned petitioner with the taser. See *id.* at 22a n.20 (majority opinion); cf. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 836 (1998) (holding that "deliberate or reckless indifference to life in a high-speed automobile chase" does not violate due process). Rather, the question here is whether respondents' admittedly intentional use of force against petitioner was undertaken with the *purpose* of inflicting punishment rather than achieving a nonpunitive objective, like ensuring compliance with their lawful orders.

As discussed, that aspect of the *Bell* standard is an objective inquiry, and the use of the term "reckless" in that context is more likely to confuse courts and litigants, because it appears to invoke the threshold distinction between intentional and unintentional governmental conduct. Accordingly, this Court should not import the concept of "recklessness" into the standard for constitutional excessive-force claims; it should instruct lower courts to apply the *Bell* standard instead.

B. The Standards For Excessive-Force Claims Under The Fourth And Eighth Amendments Do Not Apply To Pretrial Detainees

The *Bell* standard differs in some respects from the standards that this Court has established for Fourth Amendment excessive-force claims brought by arrestees and Eighth Amendment excessive-force claims brought by convicted prisoners. But those differences are attributable to the different text and purposes of those provisions and the different stages in the criminal-justice process at which they apply. And in any event, the differences in the legal standards are unlikely to matter in a significant number of real-world encounters where officers must decide whether to use force.

1. The use of force during pretrial detention does not effect a Fourth Amendment seizure

Petitioner contends (Br. 27-34) that the Fourth Amendment supplies an alternative standard for an excessive-force claim by a pretrial detainee. Although that argument is misguided, petitioner is correct (Br. 34-36) that the Fourth Amendment's reasonableness standard does not substantially differ from the objective component of the *Bell* standard.

a. The Fourth Amendment prohibits unreasonable seizures of persons. "Whenever an officer restrains the freedom of a person to walk away," either through a show of force or an exercise of force, "he has seized that person." *Tennessee* v. *Garner*, 471 U.S. 1, 7 (1985); see *Brendlin* v. *California*, 551 U.S. 249, 254 (2007). Because the Fourth Amendment's reasonableness requirement governs "*how* [a] seizure is made," *Garner*, 471 U.S. at 7, the use of force "in the context of an arrest or investigatory stop of a free citi-

zen" must be objectively reasonable, *Graham*, 490 U.S. at 394.

The use of force during pretrial detention, however, does not effect a "seizure" in the constitutional sense and so is not subject to the Fourth Amendment. Once a defendant has been placed into pretrial detention, it is not any subsequent use of force within the detention facility that "restrains [his] freedom * * * to walk away." *Garner*, 471 U.S. at 7. Rather, it is the placement into the detention facility itself that "results in restricting the movement of [the] detainee." *Bell*, 441 U.S. at 537. A subsequent use of force against him may constitute impermissible punishment, but it does not produce any additional restraint on his freedom of movement, because that freedom has already been fully extinguished upon his introduction into the facility. Even if that initial seizure is understood to continue throughout the period of detention, cf. *Albright* v. *Oliver*, 510 U.S. 266, 277-279 (1994) (Ginsburg, J., concurring), the use of force is not what effects the seizure; the detainee will remain seized regardless of whether force is employed. Cf. *Palmer*, 468 U.S. at 528 n.8 (holding that the Fourth Amendment "is inapplicable" to seizure of property from convicted prisoner's cell).

Petitioner suggests (Br. 30-32) that each incremental restriction on a detainee's freedom of movement *within* a detention facility counts as a separate Fourth Amendment seizure. Petitioner cites no case of this Court suggesting that view, and it is impracticable. Jail administrators, after all, constantly exercise physical control over detainees, both through the use of force and through the explicit or implicit threat of force. It would work a vast expansion of the Fourth

Amendment to hold that each of the many daily encounters that "necessitate some additional limitations on [a detainee's] freedom of movement" within a detention facility—such as "taking a prisoner aside for questioning," ordering him out of his cell, or breaking up a fight—constitutes an additional seizure requiring a fresh Fourth Amendment analysis. *Howes* v. *Fields*, 132 S. Ct. 1181, 1192 (2012).

Classifying every restriction on a detainee's movement as an additional Fourth Amendment seizure could foster confusion in lower courts as to whether the Fourth Amendment reasonableness standard requires a greater justification for particular restrictions than the *Bell* standard. And most significantly, petitioner does not identify any plausible reason why, on his view, each restriction on movement imposed on *convicted prisoners* would not also constitute a Fourth Amendment seizure. If so, prison administrators could be faced with a higher standard for certain conditions-of-confinement claims than the currently governing Eighth Amendment standard ("deliberate indifference"). See p. 26, *infra*. For those reasons, it is more sensible to consider the use of force under the due-process standard that this Court has already held to apply to pretrial detention.

b. In any event, as petitioner agrees (Br. 13, 34-36), applying the Fourth Amendment reasonableness standard to excessive-force claims would not produce a standard that materially differs from the *Bell* standard. The question in a traditional Fourth Amendment excessive-force case is whether the level of force used was a reasonable, proportionate means of achieving the legitimate governmental objectives appropriate to that stage of the criminal-justice process: ensuring

the safety of officers and the public and apprehending an offender. See, *e.g.*, *Plumhoff*, 134 S. Ct. at 2020-2022; *Scott* v. *Harris*, 550 U.S. 372, 383-384 (2007). In the pretrial-detention context, the governmental objectives are similar: primarily, protecting the safety of other inmates and officers and ensuring good order and discipline within the facility. See *Bell*, 441 U.S. at 559. As in arrest situations, a proportionate use of force reasonably calibrated to achieve those goals in light of the facts and circumstances facing the officer would be objectively reasonable. Accordingly, even if this Court were to hold that the Fourth Amendment applies (or reserve that question), adoption of the second, objective component of the *Bell* formulation, as a product of Fourth Amendment balancing, would ultimately be appropriate.

2. The Eighth Amendment's "malicious and sadistic" standard does not apply to excessive-force claims brought by pretrial detainees

The Eighth Amendment prohibits prison officials from applying force against inmates "maliciously and sadistically for the very purpose of causing harm." *Farmer* v. *Brennan*, 511 U.S. 825, 835-836 (1994). Although the Eighth Amendment applies only after a "formal adjudication of guilt," *City of Revere* v. *Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983), and therefore does not directly apply to pretrial detainees, respondents argued below that the Eighth Amendment standard "is appropriate whenever jail officials use force to preserve internal order and discipline and to maintain institutional security" in a pretrial-detention facility. Resps. C.A. Br. 23. That view is incorrect.

a. This Court has held that a "sentenced inmate," unlike a pretrial detainee, "may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment." *Bell*, 441 U.S. at 535 n.16 (citing *Ingraham* v. *Wright*, 430 U.S. 651, 671 n.40 (1977)); see *Sandin* v. *Conner*, 515 U.S. 472, 485 (1995). In contrast to pretrial detention, incarceration after sentencing can entail "restrictive and even harsh" conditions, *Rhodes* v. *Chapman*, 452 U.S. 337, 346-347 (1981), that are designed to achieve "valid penological objectives—including deterrence of crime, rehabilitation of prisoners," and just retribution, *O'Lone*, 482 U.S. at 348; see *Rhodes*, 452 U.S. at 352.

In light of that longstanding view, this Court has interpreted the Eighth Amendment's proscription on "cruel and unusual punishments" to bar "'only the unnecessary and *wanton* infliction of pain'" on prisoners. *Wilson* v. *Seiter*, 501 U.S. 294, 298 (1991) (emphasis added) (quoting *Whitley*, 475 U.S. at 319). That requires "more than ordinary lack of due care for the prisoner's interests or safety." *Id.* at 299 (quoting *Whitley*, 475 U.S. at 319). A plaintiff must prove both an objective element—that the prison official's conduct violated "contemporary standards of decency"—and a subjective element—that the official acted with "a sufficiently culpable state of mind." *McMillian*, 503 U.S. at 8 (citation omitted); see *Helling* v. *McKinney*, 509 U.S. 25, 35-37 (1993). A subjective element is necessary, this Court has held, for an official's action to qualify as "punishment" under the Eighth Amendment. *Wilson*, 501 U.S. at 300; see *Farmer*, 511 U.S. at 837-838.

For an Eighth Amendment excessive-force claim (as opposed to a conditions-of-confinement claim), the

subjective element requires a plaintiff to "show that [the] officials applied force 'maliciously and sadistically for the very purpose of causing harm,'" *i.e.*, with "'a knowing willingness that [harm] occur.'" *Farmer*, 511 U.S. at 835-836 (brackets in original) (quoting *McMillian*, 503 U.S. at 6, 7). Accordingly, so long as the force was used in a "good-faith effort to maintain or restore discipline," the Eighth Amendment is not violated. *McMillian*, 503 U.S. at 7. Once that subjective element is established, however, the objective element is also met; "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 9 (citing *Whitley*, 475 U.S. at 327).

As with due-process claims, this Court has suggested that the subjective element of an Eighth Amendment excessive-force claim can be inferred from objective circumstances. The Court has instructed that in deciding whether a correctional officer's use of force was "malicious and sadistic," a court should consider "such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted." *Whitley*, 475 U.S. at 320-321 (citation omitted; brackets in original). "From such considerations," the Court has held, "inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is *tantamount* to a knowing willingness that it occur." *Id.* at 321 (emphasis added).

b. The differences between the due-process standard and the Eighth Amendment standard arise from the different text of the pertinent constitutional provi-

sions and the fact that, unlike convicted prisoners, pretrial detainees have not yet been adjudicated guilty of a criminal offense. In particular, the Eighth Amendment requirement that the officer acted "maliciously and sadistically for the very purpose of causing harm" stems from the Eighth Amendment's distinct requirement that the punishment be "cruel and unusual," *i.e.*, *wanton*. *Whitley*, 475 U.S. at 320-321 (citation omitted). Because wantonness is not a requirement of a due-process claim, the officer's purpose in using force against a pretrial detainee need not rise to the level of maliciousness or sadism to violate the Constitution.

Likewise, in the Eighth Amendment context, this Court adopted a higher subjective standard for excessive-force claims ("malicious and sadistic") than for conditions-of-confinement claims ("deliberate indifference"), whereas under the due-process analysis set out above, the *Bell* standard applies to both types of claims. But that is because the Eighth Amendment's wantonness element requires a mental state for conditions-of-confinement claims—"deliberate indifference," *i.e.*, "subjective recklessness," *Farmer*, 511 U.S. at 839-840—that would be inappropriate for evaluating decisions to use force (and would be a poor fit in the context of intentional applications of force in any event). See *McMillian*, 503 U.S. at 6-7. The same problem does not exist here, because the *Bell* standard, like Fourth Amendment objective reasonableness, can readily be applied to excessive-force claims. See pp. 22-23, *supra*.

c. Detention facilities sometimes house both pretrial detainees and convicted prisoners. See *Bell*, 441 U.S. at 546 n.28. Under the framework described

above, a stricter standard for the use of force will apply to the pretrial detainees than to the other inmates, in theory giving rise to practical difficulties when the two classes of detainees are housed together.

There are substantial reasons, however, to believe that the difference in standards will not present serious practical problems for jail administration. Like the Eighth Amendment standard, the *Bell* standard gives officers substantial discretion to use force for safety and disciplinary purposes. Accordingly, in real-world encounters, an officer's decision to use force against a detainee probably would not be affected by whether the due-process or Eighth Amendment standard governs. It would be the unusual case where an officer's use of force is not malicious or sadistic (and so satisfies the Eighth Amendment) but has no reasonable relation to any legitimate nonpunitive objective (and so violates due process). In addition, many officers are subject to a use-of-force policy adopted by their detention facility that is stricter than the Eighth Amendment standard.

Moreover, it has been clear since at least 1981 that the *Bell* standard governs conditions-of-confinement claims for pretrial detainees, while the "deliberate indifference" standard governs such claims by convicted prisoners. See *Rhodes*, 452 U.S. at 347. Yet we are aware of no evidence that administrators of detention facilities housing both pretrial detainees and convicted prisoners have struggled to conform the conditions of the facilities to constitutional standards.

Finally, with respect to both due-process and Eighth Amendment claims, officers are protected from liability by qualified immunity. That defense "applies regardless of whether the government offi-

cial's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (citations and internal quotation marks omitted). Accordingly, to hold an officer liable for the use of excessive force under the *Bell* standard, absent an expressed intent to punish, it must be established that no reasonable officer in the same position could have concluded that the use of force was reasonably related to a legitimate nonpunitive objective and was proportionate to that objective. Cf. *Anderson* v. *Creighton*, 483 U.S. 635, 643-644 (1987) (holding that officers are entitled to qualified immunity if they reasonably conclude that a search is reasonable under the Fourth Amendment). Given that high threshold for liability, it is unlikely that officers will find themselves having to differentiate between pretrial detainees and convicted prisoners in deciding whether to use force.

C. The District Court Adequately Instructed The Jury On The Elements Of An Excessive-Force Claim

Under the *Bell* due-process standard for excessive-force claims discussed above, a plaintiff can succeed by proving that the use of force was not reasonably related to a legitimate nonpunitive objective (or was unreasonably disproportionate to such an objective), without proving that the defendant *in fact* had a particular culpable mental state.

Petitioner contends (Br. 11, 13) that the jury instructions in this case impermissibly required him to prove that respondents had a "bad mental state" when they used force against him. That argument does not merit reversal of the jury's verdict. As the court of appeals recognized, Pet. App. 10a-11a, a jury verdict in a civil case should be reversed for instructional er-

ror "only if it appears that the jury was misled and its understanding of the issues was seriously affected to the prejudice of the complaining party." *Westchester Fire Ins. Co.* v. *General Star Indem. Co.*, 183 F.3d 578, 585 (7th Cir. 1999) (citation and internal quotation marks omitted); see, *e.g.*, *Townsend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1237 (10th Cir. 2002) ("The instructions as a whole need not be flawless, but we must be satisfied that, upon hearing the instructions, the jury understood the issues to be resolved and its duty to resolve them."). And a reviewing court must "defer to the district court's phrasing of an instruction" so long as it "accurately states the law." Pet. App. 10a (quoting *Huff* v. *Sheahan*, 493 F.3d 893, 899 (7th Cir. 2007)).

Fairly read in light of those standards, the instructions here did not contain reversible error. In focusing on the objective reasonableness of respondents' actions, the jury instructions nearly mirrored the Fourth Amendment approach that petitioner favors.

1. The district court instructed the jury that to hold respondents liable, the jury was required to find that the force respondents used "was unreasonable in light of the facts and circumstances at the time," and that respondents "knew that using force presented a risk of harm to [petitioner], but they recklessly disregarded [petitioner's] safety by failing to take reasonable measures to minimize the risk of harm to [petitioner]." J.A. 277-278. Underscoring that the court was effectively instructing the jury on an objective-reasonableness standard, the court told the jury to consider whether the force was "unreasonable from the perspective of a reasonable officer facing the same circumstances that [respondents] faced." J.A. 278.

The court then proceeded to enumerate the various objective factors that the jury was required to consider "in deciding whether one or more [respondents] used unreasonable force and acted with reckless disregard of [petitioner's] rights": "[t]he need to use force; [t]he relationship between the need to use force and the amount of force used; [t]he extent of [petitioner's] injury; [w]hether [respondents] reasonably believed there was a threat to the safety of staff or prisoners; and [a]ny efforts made by [respondents] to limit the amount of force used." *Ibid.*

Although the instruction used a variant of "reckless" in three places, it equated reckless conduct with "'failing to take reasonable measures to minimize the risk of harm to [petitioner],'"—the objective proportionality inquiry under *Bell*—and described "'reckless disregard'" purely in terms of "uncontroversial objective considerations," as the court of appeals concluded. Pet. App. 8a-9a, 22a n.20 (quoting instructions). While attorneys and courts know that the term "reckless" can connote a subjective mental state, such as consciously disregarding a substantial risk, see *Farmer*, 511 U.S. at 839, the use of that term in the instruction here would not have led a lay jury to conclude that respondents could be held liable only if they actually had a particular subjective "bad mental state." See *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir. 2008) ("When the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete

or otherwise subject to criticism."), cert. denied, 558 U.S. 816 (2009).[2]

Even considered in light of the term's common legal connotation, moreover, the inclusion of recklessness was at most irrelevant in a case in which respondents did not dispute that they had used force intentionally. Indeed, that was petitioner's principal basis for objecting to the instruction in the district court. See J.A. 229 ("[I]n an excessive force case, the conduct will always be intentional. Indifference or disregard makes no sense."); see also J.A. 231. But the instruction was not likely to have the led the jury to believe that liability required the officers to have had a "bad mental state," such as a punitive or malicious intent.

For the reasons given above (see pp. 18-19, *supra*), in the future courts should not invoke the concept of recklessness in excessive-force cases. But the idiosyncratic way in which that term was used in the instruction here would not have misled the jury into entering a verdict for respondents on the ground that they lacked a particular subjective intent.

2. The excessive-force instruction was imprecise in two respects that petitioner does not challenge. Those flaws therefore provide no grounds for reversal. But the instruction given here should not be taken as a model for future cases.

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[2] The court's punitive-damages instruction used the term "reckless disregard" in a different sense ("complete indifference" to petitioner's safety or rights), J.A. 281-282, but petitioner has not argued that the punitive-damages instruction could have misled the jury on the liability instruction. To the contrary, the punitive-damages instruction makes clear that the standard for punitive damages is higher than the threshold standard for liability.

First, the district court did not instruct the jury under the first prong of the *Bell* standard that it could hold respondents liable if they had in fact acted with an explicit punitive purpose. But petitioner never requested such an instruction; to the contrary, he argued against any "separate subjective element" at all. J.A. 229.

Second, the instructions did not inform the jury that to be lawful, respondents' use of force had to be a reasonable and proportionate means of achieving a *nonpunitive* objective. But again, petitioner did not object on that ground. And in any event, the omission was harmless because respondents never argued that their actions could be justified as reasonably related to an interest other than prison safety and discipline. Instead, they argued that petitioner's refusal to comply with orders and physical resistance "led to the officers involved understandably being concerned that somebody was going to get hurt," D. Ct. Doc. 156, at 119, 135, and that Degner had stunned petitioner with the taser "solely for the purpose of getting [petitioner] to comply so they could take the cuffs off and leave the cell," *id.* at 136; see *id.* at 144-145.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2015

APPENDIX

1. U.S. Const. Amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. U.S. Const. Amend V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. U.S. Const. Amend VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. U.S. Const. Amend. XIV provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Con-

gress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

5. 42 U.S.C. 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No. 14-6368

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
- 2015
OFFICE OF THE CLERK

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embedded in the Constitution. The ACLU of Wisconsin is one of its statewide affiliates. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as amicus curiae.

The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of incarcerated persons, including pretrial detainees. In furtherance of that goal, the National Prison Project has brought numerous cases on behalf of prisoners seeking to ensure that conditions of confinement, including in city and county jails, comply with the Constitution. Similarly, the ACLU of Wisconsin has litigated conditions of confinement in county jails in Wisconsin, including an ongoing class action involving the Milwaukee County Jail. This case is of significant interest to the ACLU in light of its potential consequences for the ability of pretrial detainees to protect themselves from the objectively unreasonable abuse and violence that pervades city and county jails across the Nation.

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[1] Letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The ACLU agrees with petitioner that the Constitution protects pretrial detainees from the government's use of objectively unreasonable force, regardless whether the perpetrator intended to deprive the victim of his rights or was recklessly indifferent to such a deprivation. Rather than repeat the doctrinal arguments petitioner advances, this brief seeks to provide important context for the Court's deliberations by demonstrating two key facts about pretrial detention that weigh in favor of petitioner's position. First, a great proportion of pretrial detainees stand charged with nonviolent offenses and remain in custody—despite being presumed innocent—not because of any propensity for violence, disruption, or misconduct, but because their indigence precludes them from securing their own freedom before trial. Second, a culture of endemic guard-on-detainee violence characterizes many of our Nation's pretrial-detention facilities, underscoring both the need for strong constitutional protection of detainees and the inadequacy of subjective intentions as a reliable source of that protection.

I. An examination of the pretrial-detainee population confirms that financial security is a significant, and often dispositive, indicator of whether a defendant will be forced to await trial behind bars. Hundreds of thousands of Americans are currently detained in pretrial custody, many of whom remain in jail not because they have been found to represent a flight risk or danger to the public, but because they lack the financial resources necessary to secure their release. Put simply, they cannot afford to pay their bail or the fees they have incurred as a result of the legal process. Even bail assessments that are legally permissible can in practice be excessive for the poorest of defendants.

Pretrial detention thus disproportionately affects the indigent—and in turn disproportionately affects racial and ethnic minorities—without regard to any propensity for disruption or violence. Reflecting the population of arrestees as a whole, many if not most pretrial detainees have been accused only of nonviolent crimes. Another significant portion of the detainee population consists of individuals who have not been accused of any crime at all, but rather have been jailed for failure to pay debts or fees associated with the criminal process. The standard governing excessive-force claims should not be made more difficult simply because these defendants are too poor to avoid detention. For defendants who remain free from physical custody while awaiting trial, the Constitution protects against unreasonable, physically abusive government conduct without regard to the subjective motivations behind an assault. *See Graham* v. *Connor*, 490 U.S. 386 (1989). Predominantly indigent, non-violent pretrial detainees—who have been found guilty of no crime and are equally entitled to the presumption of innocence—should enjoy the same protection against the use of objectively unreasonable force.

II. The need for such protection is underscored by evidence of rampant and severe guard-on-detainee brutality in many pretrial-detention facilities across the country. While it comes as no surprise that jail is unpleasant, the prevalence and degree of violence and guard-on-detainee abuse in this country's jails—much of which goes underreported—commands attention. Investigative reports by the Department of Justice, studies by the ACLU and other investigative and scholarly works reveal widespread abuses at pretrial-detention facilities from Rikers Island to the Cook County Jail to the Los Angeles County Jail system. In particular,

these studies reveal that presumptively innocent pretrial detainees often find themselves enmeshed in a culture of violence, where excessive force is so common that it can cease to seem noteworthy, perhaps most of all to those perpetrating it.

Given the prevalence of violence in these facilities—and its tendency to skew a perpetrator's subjective sense of reasonableness—a standard of objective reasonableness should govern claims challenging the use of force against detainees who are too poor to afford their own pretrial freedom, but must await trial in environments rife with guard-on-detainee violence. The prevalence of such violence, and the difficulty of bringing it under control, counsel against any loosening of that constitutional standard.

ARGUMENT

I. PRETRIAL DETAINEES ARE PRIMARILY INDIGENT AND NON-VIOLENT

County and city jails in the United States are home to more than 700,000 incarcerated individuals, who spent an average of 23 days in jail in 2013. *See* Minton & Golinelli, Bureau of Justice Statistics, U.S. Dep't of Justice, *Jail Inmates at Midyear 2013—Statistical Tables* 1 (rev. Aug. 12, 2014) ("*2013 Statistical Tables*"); Subramanian et al., VERA Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 10 (2015) ("VERA Report"). The majority of the jail population—over 60 percent as of 2013—are pretrial detainees who have not been tried or convicted on a current charge. *2013 Statistical Tables* 1.

Most pretrial detainees have not been confined out of concern for possible dangerousness or risk of flight. Reflecting the overall population of jailed persons—of

which approximately 75 percent were in custody for nonviolent crimes—only a fraction of pretrial detainees face charges for violent crimes. *See* Eric Holder, Att'y Gen., U.S. Dep't of Justice, Address at the National Symposium on Pretrial Justice (June 1, 2011), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice; *see also* VERA Report 5 (citing James, Bureau of Justice Statistics, U.S. Dep't of Justice, Profile of Jail Inmates, 2002, at 3 (2004)). The remainder stand accused of property-related and other nonviolent crimes, or, in many cases, the "offense" of owing someone (typically the government) money they cannot afford to pay. *Id.* According to an American Bar Association study, two-thirds of pretrial defendants "pose no significant risk to themselves or the community ... [and] represent[] a low risk of flight." American Bar Association, Criminal Justice Section, *State Policy Implementation Project* 2, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.pdf (last visited Mar. 9, 2015).

Instead, the chief factor distinguishing most pretrial detainees from defendants who have been released to await trial on bail is not a greater propensity for violence or flight, but simply indigence. As one study recently found, "[m]oney, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial." VERA Report 32.

In many cases, defendants face pretrial detention simply because they cannot afford to post bail. Although the Eighth Amendment prohibits imposition of "excessive" bail, *see United States* v. *Salerno*, 481 U.S. 739, 744-745 (1987), courts retain significant discretion to set bail amounts. In the exercise of that discretion, courts often set those amounts at levels many

defendants cannot afford. *See* Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 Cardozo L. Rev. 1947, 1958-1962 (2005).[2] For example, the Department of Justice recently condemned the use of so-called "fixed-bail" procedures, which in practice "essentially mandate pretrial detention for anyone who is too poor to pay [a] predetermined fee." Statement of Interest, at 9, Dkt. No. 26, *Varden* v. *City of Clanton*, No. 2:15-cv-00034-MHT (M.D. Ala. Feb. 13, 2015). In a study of detainees charged with felonies in state court, the Bureau of Justice Statistics recently found that as many as five out of six detainees were given the opportunity to be released on bail pending trial but could not afford the amount of bail set. Burdeen, Pretrial Justice Institute, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* 5 (Sept. 2009) (citing Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts, SCPS 1990-2004* (Jan. 2009 rev.)).

A study of non-felony defendants in New York City revealed similar patterns. In 2008, fewer than 18 percent of non-felony defendants in New York City courts posted bail when it was set at $500; only 11.3 percent posted bail when it was set at $1,000. Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low-Income Nonfelony Defendants in New York City* 21 (2010) ("*Price of Freedom*"). The remaining 80-plus percent of defendants who did not pay the $500 or $1,000 presumably were not willfully withholding it in order to be sent to jail; more likely, they simply

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[2] Indigent defendants often are not represented by counsel at bail hearings. *See* Colbert, *Connecting Theory and Reality: Teaching* Gideon *and Indigent Defendants'* Non-Right *to Counsel at Bail*, 4 Ohio State J. Crim. L. 167, 170-171 (July 2006).

could not afford it. As a result, they spent an average of 15.7 days behind bars. *Id.* at 23.

Another significant portion of the county and city jail population consists of individuals who have been detained simply because they have failed to pay debts or judicially imposed fees, fines, costs, or restitution known as legal financial obligations (LFOs). *See* American Civil Liberties Union, *In For a Penny: The Rise of America's New Debtors' Prisons* 5 (Oct. 2010) ("*In For a Penny*"). Although this Court has long recognized "debtors' prisons" to be unconstitutional, *see Bearden* v. *Georgia*, 461 U.S. 660 (1983), several studies have documented the extent to which indigent defendants are detained for failure to pay such costs.[3] For example, an ACLU investigation of practices in five States found widespread increases in the assessment and collection of LFOs from incarcerated persons, likely a reaction to a struggling economy and resulting need for new sources of cash for local governments. *See In For a Penny* 5-9. Whatever the reason, the outcome is that indigent defendants are repeatedly arrested and detained for failure to pay LFOs, warrant fees, and even "booking and jail 'pay-to-stay' fees"—a process through which detainees are invoiced for the costs of room and board, medical and dental treatment, and random drug testing during the detention period. *Id.* at 10. These detainees "accumulate debt layer by layer," "creat[ing] an untenable situation." Levingston & Turetsky,

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[3] We do not suggest that the doctrinal analysis of excessive-force claims brought by debtors who have been jailed as punishment for contempt of court necessarily follows the analysis applicable in pretrial-detainee cases. *See Bell* v. *Wolfish*, 441 U.S. 520, 537 n.17 (1979). But we include a discussion of individuals who have been detained as debtors to provide a complete description of the predominantly indigent and nonviolent jail population.

Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry, Clearinghouse Rev. J. Poverty L. Pol'y 187, 188 (July-Aug. 2007). And when those defendants are released from detention, they are likely to be poorer than when they went in and thus increasingly vulnerable to being incarcerated again. VERA Report 16.

Like other pretrial detainees, individuals who have been jailed for failure to pay their debts thus predominantly pose no particular threat to jailhouse security, but are simply too poor to avoid detention. Aggressive collection practices can increase the likelihood that such nonviolent, indigent individuals will end up in pretrial-detention facilities. *See In For a Penny* 59. In certain Alabama localities, for example, debt collectors have "ma[d]e their money by adding fees onto the bills of the defendants," incentivizing their continued billing and jailing of indigent defendants. Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, NY Times, July 3, 2012, at A1, http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all&_r=0; *cf.* Judgment, Dkt. No. 51, *Mitchell* v. *City of Montgomery*, No. 2:14-cv-186-MEF (M.D. Ala. Nov. 17, 2014) (approving settlement agreement in suit by citizens of Montgomery who had been jailed for failure to pay traffic fines in which City of Montgomery agreed to implement certain reforms). Similarly, in Colorado, before the State changed its law, many courts issued so-called "pay-or-serve" warrants, under which debtors were required either to pay the full amount of their outstanding debts or to "pay down" those debts by serving time in jail. American Civil Liberties Union of Colorado, *Debtors' Prisons*, Case No. 2013-209 (2013), http://aclu-co.org/court-cases/debtors-prisons/; *see* American Civil

Liberties Union of Colorado, *End Debtors' Prisons*, http://aclu-co.org/campaigns/end-debtors-prisons/ (last visited Mar. 9, 2015). And before it was deemed a violation of due process, a Spokane County, Washington policy known as "auto-jail" obligated debtors to turn themselves in to jail if they could not pay outstanding debts. *In For a Penny* 65-67; *see also State* v. *Nason*, 233 P.3d 848, 848-849 (Wash. 2010).

Correlation between a defendant's indigence and his race or ethnicity means that the disproportionate impact of pretrial detention on the indigent in turn contributes to racial and ethnic disparities in city and county jails. While approximately 65 percent of white/non-Hispanic and Asian/Pacific Islander felony defendants secured pretrial release in the federal court system, only 43 percent of black/non-Hispanic defendants and 20 percent of Hispanic defendants secured such release. Cohen, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010*, at 10 (2012). Black men in particular are disproportionately detained before trial due to an inability to post bail their white counterparts can more often afford. VERA Report 15. In New York City jails, for example, "[p]retrial punishment in the form of detention because of inability to post bail is endured primarily by blacks and Hispanics." *Price of Freedom* 47.

The majority of the U.S. jail population thus comprises mostly indigent detainees and debtors, disproportionately of racial or ethnic minorities, a significant proportion of whom have not been charged with any crime of violence and are not thought to pose any particular danger to the community but cannot afford to prevent their own detention. Were these individuals able to secure their own release, they would enjoy

significant constitutional protection from objectively unreasonable uses of force by the government. In particular, a defendant who remains free on bail while awaiting trial on a pending charge would not be required to meet the more difficult Eighth Amendment standard, which includes a showing of malicious intent, if he were subjected to objectively unreasonable police violence. *See Graham* v. *Connor*, 490 U.S. 386, 395 (1989). A defendant's right to protection from such violence should not be diminished simply because he cannot afford to avoid detention pending trial.

II. Pretrial Detainees Face Endemic Guard-On-Detainee Violence

As documented by the U.S. Department of Justice and others, guard-on-detainee violence has persisted as a significant and intractable problem in U.S. jails.[4] The frequent—and underreported—abuse of detainees by jailhouse staff has fostered cultures of excessive force in jails across the country, threatening pretrial detainees' health, safety, and constitutional rights. At the same time, these cultures of violence can distort the perpetrators' subjective sense of reasonableness, making a subjective recklessness or malice standard a particularly inapt tool for curbing jailhouse violence.

In the New York City municipal jail system, the prevalence of guard-on-detainee violence at Rikers Island—which houses primarily pretrial detainees, including adolescents—provides a notorious example.

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[4] DOJ investigates and prosecutes patterns of violence and other constitutional violations at detention facilities pursuant to the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§ 1997 *et seq.* ("CRIPA"). *Id.* § 1997a. Much of the information presented below derives from materials generated through such CRIPA investigations.

The U.S. Attorney for the Southern District of New York recently investigated violence at Rikers, focusing on staff-on-detainee brutality. *See* Letter from USAO for the Southern District of New York to Mayor Bill de Blasio et al. re CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island (Aug. 4, 2014).[5] The investigation revealed that guards routinely employed excessive force and sought to justify those uses of force by making false claims about detainee resistance or misconduct. *Id.* at 8-9, 10-20. Guards' decisions to use force in the first place were often inappropriate or inadequately reasoned. Staff-perpetrated violence ranged from "casual and spontaneous" to "premeditated and severe." *Id.* at 23. Moreover, some staff displayed a "combative approach and tendency to aggressively push inmates" in a manner reflecting a "deep-seated culture of violence" and resulting in perpetual fear among the jailed. *Id.* at 3, 19.

Although multiple public reports have exposed egregious practices at Rikers, the extent of the violence has not subsided. As of February 2015, "violence [at Rikers] has continued largely unabated, despite extraordinary levels of outside scrutiny [and] a substantial commitment ... by [the government of New York City]." Winerip & Schwirtz, *Even as Many Eyes Watch, Brutality at Rikers Island Persists*, N.Y. Times, Feb. 21, 2015, http://www.nytimes.com/2015/02/22/nyregion/even-as-many-eyes-watch-brutality-at-rikers-island-persists.html.

Across the country, the Los Angeles County Jail system—the largest of its kind in the country—has

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[5] The U.S. Attorney's investigation at Rikers focused mainly on treatment of incarcerated adolescent males, but its findings shed light on conditions at the facility as a whole.

been the subject of similar scrutiny. Pretrial detainees account for approximately 45 percent of the L.A. County Jail system population, and they face an environment pervaded with brutality and abuse. According to independent investigative reports by the Citizens' Commission on Jail Violence and the ACLU, guards in the L.A. County system have employed extreme brutality and violence to discipline the incarcerated, targeting the mentally ill in particular. *See* Citizens' Commission on Jail Violence, *Report of the Citizens' Commission on Jail Violence* (2012), http://ccjv.lacounty.gov/wp-content/uploads/2012/09/CCJV-Report.pdf ("CCJV Report"); American Civil Liberties Union National Prison Project and the ACLU of Southern California, *Cruel and Usual Punishment: How a Savage Gang of Deputies Controls L.A. County Jails* (Sept. 2011), https://www.aclu.org/files/assets/78162_aclu_jails_r2_lr.pdf ("ACLU L.A. County Jails Report"). Witnesses reported that force was often used "to ensure compliance" with staff orders, "even though no threat was present." CCJV Report 31. For example, in one reported incident when a detainee failed to obey a deputy's order, "the deputy walk[ed] up to the inmate and smash[ed] his head into the wall." *Id.* "The inmate then fell to the floor and the deputy began kicking the inmate. Other deputies joined the altercation as well." *Id.*

Such incidents, many of which have resulted in severe injury or even death to detainees, have persisted for years notwithstanding a 2002 Memorandum of Agreement with DOJ, in which the L.A. County Jail system agreed to implement extensive reforms. *See* ACLU L.A. County Jails Report 8; Memorandum of Agreement Between the United States and Los Angeles County, California, Regarding Mental Health Services at the Los Angeles County Jail (2002), http://www.

justice.gov/crt/about/spl/documents/lacountyjail_mh.php. Although these proposed reforms focused on mental-health services, they touched also on extensive flaws in treatment of detainees generally and oversight of jail staff. Nonetheless, reform efforts did not succeed. More recently, the ACLU brought suit on behalf of two pretrial detainees who were brutally beaten by deputies at L.A. County Jails. *See Rosas* v. *Baca*, No. 12-cv-00428 (C.D. Cal. 2014). As a result of that lawsuit, the Jail agreed to implement comprehensive reforms to correct endemic violence. *See* Order Preliminarily Approving Parties' Proposed Settlement, Dkt. No. 111, *Rosas* v. *Baca*, No. 12-cv-00428 (C.D. Cal. Jan. 23, 2015). Whether those efforts will succeed where previous ones have failed remains to be seen.

Problems similar to those found at Rikers and L.A. County have been identified at Cook County Jail in Illinois—the largest single-site county jail in the United States. Out of approximately 9,800 total male and female prisoners in the jail, most are pretrial detainees. *See* Letter from Grace Chung Becker, Acting Assistant Attorney General, Civil Rights Division to Todd H. Stroger, Cook County Board President, re Cook County Jail, Chicago, Illinois 1-3 (July 11, 2008), http://www.justice.gov/crt/about/spl/documents/CookCountyJail_findingsletter_7-11-08.pdf ("Cook County Findings Letter"). According to DOJ findings, detainees at Cook County were "regularly subjected to inappropriate and excessive uses of physical force." *Id.* at 10. Cook County officers "too often respond[ed] to inmates' verbal insults or failure to follow instructions by physically striking inmates, most often with the active assistance of other officers, even when the inmate present[ed] no threat to anyone's safety or the security of the facility." *Id.* DOJ has made clear that "[a] verbal taunt from an

inmate ... may appropriately result in disciplinary action, but it should not require a physical response [from a guard]." *Id.* Physical responses by Cook County guards were nonetheless routine in practice, regardless of the nature of the provocation. *See id.* at 10-12. On some occasions, guard-on-detainee violence could be provoked by even less than a verbal insult. In one instance described by DOJ, for example, a detainee who continued to tap repeatedly on the wall during a strip-search after being instructed to stop tapping was "slammed ... on top of a cart and against the wall" and "pulled into the hallway where ... [h]e was hit in the face, dragged by his hair, choked, and beaten." *Id.* at 13.

The guard-on-detainee violence that characterizes jail systems like Cook County, L.A. County, and Rikers has proved difficult to control in large part because of its deep roots in jailhouse culture. In many jails, "tolerance for excessive force used by at least some deputies ... has the danger of leading to ... 'abuses of force [that become] ... so 'normalized' that deputies can no longer perceive them as abusive.'" CCJV Report 98-99. Endemic violence thus "perpetuate[s] a damaging culture that can ultimately affect even those deputies ... who do not subscribe to these views and are intent on doing the right thing." *Id.*

The Citizens' Commission on Jail Violence found that in L.A. County jails, for example, department personnel applied for years what they referred to as a "force first" approach, under which "force has been viewed by some Custody deputies as a means to control the inmate population rather than a last resort response." CCJV Report 97. Within that system, "deputy reactions were often disproportionate and excessive." *Id.* Indeed, "in nearly three out of five force incidents, [L.A. County Sheriff's Department] personnel

used force against an inmate who was *not* engaged in an assault and who may have done nothing more than passively disobey an instruction." *Id.* at 39. A former captain at the jail described this as a "mindset ... among the deputies ... that force was necessary to assert authority and show inmates who was in charge." *Id.* at 97.

When objectively unreasonable uses of force pervade the jail environment, that culture shapes guards' subjective perceptions of the appropriateness of violence. At Cook County Jail, for example, according to "a top security administrator," a "'culture of abusing inmates'" existed at the jail, and unnecessary uses of force by guards often went unchecked. Cook County Findings Letter 10. Indeed, DOJ uncovered multiple instances in which force was used a means of punishment or retribution against detainees, including mentally ill individuals who could do little to defend themselves. *Id.* at 14-16. Similarly, in L.A. County, officials in charge of the jail system concealed incidents of violence for decades and disciplined guards for use of "unreasonable" force in fewer than one percent of the 5,630 use-of-force incidents that occurred over a six-year period. CCJV Report 40-41; *see also id.* at 5. The jail system's own finding after an internal investigation—that fewer than one of every one-hundred uses of force was "excessive"—"paint[s] a picture of an inadequate investigatory and disciplinary system" and underscores why protection of the safety and constitutional rights of pretrial detainees should not turn on the subjective perceptions of jail guards whose attitudes toward violence are shaped by such an environment. *Id.* at 41.

Inadequacy of oversight and accountability compounds the problem of rampant jailhouse violence and further distorts subjective understandings of the

proper use of force. In Cook County, for example, if guards reported incidents of violence at all, they regularly failed to document the full extent of the force used. Cook County Findings Letter 18-19. Moreover, Cook County Jail "ha[d] no tracking or early warning system to identify those officers ... whose actions [had] elicited the most complaints of excessive force ... or injuries." *Id.* at 20. When officials did investigate potentially excessive uses of force within the jail system, they did so incompletely, failing to ask key questions such as how the incident had occurred or why the detainee was injured. *Id.* at 22.

Pretrial detainees, a great proportion of whom are nonviolent individuals who pose no particular danger to jailhouse safety and order—and many of whom would likely be free on bail but for their indigence—thus face a significant possibility that they will be the victims of violence at the hands of jailhouse staff. When that violence rises to the level of objective unreasonableness, as it does all too often in many of the Nation's largest pretrial-detention facilities, the constitutional standard should not be relaxed to accommodate it. And the perpetrator should not be able to evade liability by invoking a subjective perception of violence that reflects an environment in which such violence is par for the course.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTEREST OF *AMICI CURIAE*

Amici curiae are former corrections administrators, supervisors, and experts who have first-hand experience establishing and administering policies on the use of force in state and local correctional settings.[1]

John Clark was the Assistant Director of the Federal Bureau of Prisons between 1991 and 1997. From 1989 to 1991, Mr. Clark was the Warden of the U.S. Penitentiary Marion, the highest-security federal prison in the United States. Mr. Clark has more than 40 years of experience in the field of corrections.

Justin Jones was the Director of the Oklahoma Department of Corrections from 2005 to 2013. Mr. Jones has worked in the field of corrections for more than 35 years.

Chase Riveland was the Executive Director of the Colorado Department of Corrections between 1983 and 1986 and Secretary of the Washington State Department of Corrections from 1986 to 1997. Mr. Riveland has more than 40 years of experience in the field of corrections.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the consent of the parties have been filed with the Clerk.

Jeffrey Schwartz is the Founder and Chief Executive Officer of LETRA, Inc., a non-profit organization concentrating on corrections training and research. Mr. Schwartz has more than 30 years of experience working in correctional facilities, including experience as a court-appointed monitor tasked with implementing use-of-force policies. Mr. Schwartz has written state and local use-of-force policies, and he has trained staff on use of force in many jurisdictions.

Phil Stanley was Commissioner of the New Hampshire Department of Corrections between 2000 and 2003. Mr. Stanley has 40 years of experience in the field of corrections.

Eldon Vail was Secretary of the Washington State Department of Corrections between 2007 and 2011. He has been the superintendent of three adult correctional institutions and has worked at various levels of correctional administration for more than 35 years. Mr. Vail is currently a correctional consultant and expert witness on correctional issues.

SUMMARY OF ARGUMENT

As former corrections administrators and experts, *amici* have first-hand experience establishing and administering policies on the use of force in state and local correctional settings. There is consensus among corrections administrators and experts that an objective standard should be used in the written policies, training, oversight, and disciplinary procedures that govern use of force by correctional staff. The

consensus is that this objective standard should be used for all incarcerated persons, including pretrial detainees and convicted prisoners.

Actual practice in jails reflects corrections professionals' view that objective standards are best. Jurisdictions across the country have adopted objective standards for evaluating whether use of force against pretrial detainees is appropriate. Most of the largest jails in the United States apply objective rules to correctional officers' use of force. In addition, States with large populations of pretrial detainees similarly require that jails implement objective standards governing the use of force. Training, oversight, and discipline of correctional officers who use force are also grounded in objective principles. Accordingly, adopting an objective constitutional standard to govern the use of force against pretrial detainees will not conflict with the legal presumptions on which jails in the United States operate already or alter the policies and procedures governing use of force in those jails.

The use of excessive force is a critical issue confronted by all jails. Repeated instances of excessive force in a facility can create a culture of violence, and without objective written rules to enforce, there is often no mechanism by which to hold corrections officers accountable for inappropriate uses of force. The Executive Branch in recent years has found pervasive excessive force in some jails. To combat these problems, the U.S. Department of Justice (DOJ) has required these institutions to meet objective standards for the use

of force. These efforts to remedy uses of excessive force will be hindered by a constitutional standard that considers a correctional officer's subjective mental state when evaluating whether the use of force against detainees was appropriate. In addition, a subjective analysis likely will have a corrosive effect on staff accountability in most jails.

For these reasons, *amici*'s considered view is that an objective standard for evaluating correctional officers' use of force against pretrial detainees will reflect the current consensus on best practices and the standards that are currently used by local jails. In addition, an objective standard will provide the clearest guidance to local corrections facilities, officials, and employees who wish to comply with the Constitution when they must use force to control pretrial detainees.

ARGUMENT

This Court should adopt an objective standard for evaluating claims of excessive force brought by pretrial detainees. In addition to being the constitutionally proper standard, an objective rule comports with the current consensus among corrections professionals about best practices for promulgating use-of-force policies. Moreover, an objective constitutional standard will match the vast majority of written use-of-force policies adopted by jails across the United States. Finally, an objective standard will provide correctional facilities with a more effective means of curbing the use of excessive force against pretrial detainees.

I. THERE IS CONSENSUS IN THE CORRECTIONS PROFESSION THAT OBJECTIVE STANDARDS SHOULD GOVERN USE OF FORCE AGAINST PRETRIAL DETAINEES

There is widespread agreement among corrections administrators and experts that policies governing correctional officers' uses of force—including training and discipline relating to the use of force—must be based on objective standards that take into account the circumstances confronted by the officer but not that officer's state of mind in deciding whether force should be used.

For example, the American Correctional Association—the oldest association of practitioners in the correctional profession and author of model corrections guidelines since 1870—has promulgated *Performance-Based Standards for Adult Local Detention Facilities* that are entirely objective when it comes to use of force.[2] These standards, which establish "mandatory practices" for the profession, do not provide any leeway for consideration of subjective intent. AMERICAN CORRECTIONAL ASSOCIATION, PERFORMANCE-BASED STANDARDS FOR

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[2] A report supported by the National Institute of Corrections of the DOJ calls these standards "perhaps the most widely recognized professional standards. Many states and other professional organizations have modeled their standards after those developed by ACA." MARK D. MARTIN & PAUL KATSAMPLES, U.S. D.O.J., NAT'L INST. OF CORRECTIONS, SHERIFF'S GUIDE TO EFFECTIVE JAIL OPERATIONS 20 (2007).

ADULT LOCAL DETENTION FACILITIES, Standard 2B, at 32 (4th ed. 2004).

Similarly, the model use-of-force policy issued by LETRA—a non-profit organization concentrating on corrections and a frequent collaborator with the National Institute of Corrections—states that the "type and amount of force used shall be reasonable given the situation and the correctional objective to be achieved." LETRA, Inc., *Model Use of Force Policy* § 6.0.4 (Oct. 29, 2014), *available at* http://www.loevy.com/Kingsley/Amici/LETRA-Model-Use-of-Force-Policy.pdf. This model policy also provides that the force used "must be minimal," and that officers use "only that amount of force which is sufficient to overcome the resistance." *Id.* § 7.0.5.[3]

Consistent with this national consensus among corrections professionals, court-appointed monitors have required for decades that jails adopt objective standards governing the use of force against pretrial detainees. In 1979, the State of Georgia established a "Jail Standards Study Commission,"

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[3] The American Bar Association has likewise promulgated model standards for the use of force against confined individuals. The ABA standard, which does not distinguish between pretrial detainees and convicted prisoners, uses an objective rule that does not permit consideration of the mental state of the officer. American Bar Association, Standards for the Treatment of Prisoners, at 23-5.6, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-5.6.

supported by grants from the DOJ, which published minimum standards for jail facilities in the State. GEORGIA JAIL STANDARDS STUDY COMMISSION, MINIMUM STANDARDS FOR GEORGIA JAIL FACILITIES (1979), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/72154NCJRS.pdf. The Commission's standard for use of force in jails does not include a subjective element and focuses only on objective factors. See *id.* § 4.23.

More recently, in *Rosas, et al., v. Baca*, No. 12 C 428 (C.D. Cal., pending 2015), court-appointed monitors of the Los Angeles Sheriff's Department issued an implementation plan as part of the settlement of a lawsuit concerning officers' pervasive use of excessive force in the Los Angeles County Jail. See Implementation Plan, *Rosas v. Baca*, No. 12 C 428 (C.D. Cal., pending 2015), *available at* http://www.lacounty.gov/files/rosas.pdf. The implementation plan is explicit that staff may use only "the amount of force that is necessary and objectively reasonable to overcome the resistance[.]" *Id.* § 2.2. Nowhere does the implementation plan reference the officer's subjective intent or recklessness in connection with the use of force against detainees. See *id.*

These examples represent the current and well-established thinking among corrections professionals about the best policies for use of force in jails. Each of the models just discussed prohibits objectively unreasonable force. In no instance is there an exception carved out to justify a jailer's unreasonable use of force undertaken with a mental state short of recklessness. In *amici*'s view,

the well-established measure of appropriate uses of force in the jail setting is whether the force is objectively reasonable under the circumstances.

II. JAILS NATIONWIDE ALREADY USE OBJECTIVE STANDARDS FOR USE OF FORCE

Consistent with the professional consensus, correctional institutions throughout the nation currently use an "objective reasonableness" standard to evaluate whether use of force against a detainee is appropriate, as Petitioner points out in his brief. See Pet. Br. 26 & n.7.

1. Almost all jails have written policies governing jailers' use of force, and an objective standard is nearly universal in these written policies. To put that in perspective, there are roughly 750,000 pretrial detainees in the United States on any given day. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (2014), at 2, *available at* http://www.bjs.gov/content/pub/pdf/cpus13.pdf.[4] The 10 most populous jails in the country account for approximately 12 percent of the total national jail population. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, ANNUAL SURVEY OF JAILS, 2013 (2015), *available at*

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[4] The DOJ's most recent count is 731,200 pretrial detainees as of June 30, 2013. *Id.*

http://doi.org/10.3886/ICPSR35517.v1.[5] These most populous jails consistently impose on their employees an objective standard for using force against pretrial detainees.[6]

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[5] These 10 facilities together had a jail population of 90,113 as of June 30, 2013. *Id.* They are the Los Angeles County Jail (18,433 pretrial detainees as of June 30, 2012), the New York City Department of Corrections (Rikers Island) (11,518), the Cook County Jail in Chicago (10,428), the Harris County Jail in Houston (9,297), the Philadelphia Prison System (9,028), the Maricopa County Jail in Phoenix (8,057), the Orange County Jail in Santa Ana, California (6,924), the San Bernardino County Jail (6,018), the San Diego County Jail (5,459), and the Miami-Dade County Correctional and Rehabilitation Facility (4,951). *Id.*

[6] Each of the 10 largest jails has adopted an objective standard governing the use of force. For the policies among these that are publicly available, see:

- Los Angeles County Jail, Use of Force Policy §§ 3-10/005.00 & 3-10/020.00-030.00, *available at* http://shq.lasdnews.net/content/uoa/EPC/force-policy.pdf ("Department members shall use only that force which is objectively reasonable.");
- The City of New York, Department of Correction, Directive 5006R-C, *available at* http://www.loevy.com/Kingsley/Amici/New-York-Department-of-Corrections-Use-of-Force-Policy.pdf ("It is expressly prohibited to use more force than is necessary to restrain the inmate, control the situation or protect oneself or others.");
- Cook County Sheriff's Office Orders, Order No. 11.2.1.0, Response to Resistance/Use of Force Policy, *available at* http://www.loevy.com/Kingsley/Amici/Cook-County-Use-of-Force-Policy.pdf ("Officers shall use an amount of force reasonable and necessary based on the totality of the circumstances to perform a lawful task, effect an arrest, overcome resistance, control a subject, or protect the officer(s)

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or others from injury, as specified by federal/Illinois statutes and case law.");

- Harris County Sheriff's Office Department Manual, Chapter III §§ 1.0(A)(10)-(11) & 1.0(B), *available at* http://www.loevy.com/Kingsley/Amici/Harris-County-Use-of-Force-Policy.pdf (establishing that "[a] Deputy is justified in using force against another when and to the degree the Deputy reasonably believes the force is immediately necessary to accomplish lawful objectives," and defining "reasonable belief" as "[a] belief that would be held by an ordinary and prudent person in the same circumstances as the acting person.");
- Philadelphia Prisons Policies & Procedures, Policy No. 3.A.8, *available at* http://www.loevy.com/Kingsley/Amici/Philadelphia-Prisons-Use-of-Force-Policy.pdf (defining "excessive force" as "the application of an unreasonable amount of force beyond what is necessary in a given incident based on the totality of the circumstances");
- Maricopa County Sheriff's Office, Policy & Procedure, Policy No. CP-1, *available at* http://www.loevy.com/Kingsley/Amici/Maricopa-County-Use-of-Force-Policy.pdf ("The purpose of this policy is to provide officers with guidelines on the authorized use of force or control that objectively reasonable officers would apply in the performance of their lawful duties.");
- San Diego County Sheriff's Department, Policy and Procedure Manual, Procedure Section, Rule 2.49, *available at* http://www.sdsheriff.net/documents/pp-20150115.pdf ("Employees shall not use more force in any situation than is reasonably necessary under the circumstances."); and
- Miami-Dade Corrections and Rehabilitation Department, Department Standard Operating Procedure No. 11-041, *available at* http://www.fla-pac.org/reply_docs/f_506/DSOP%20response%20to%20resistance.pdf (defining "appropriate force" as "[t]he amount of physical control reasonably necessary to gain control of a subject").

The San Diego County Jail's Policy & Procedure Manual, for instance, instructs that correctional officers "shall not use more force in any situation than is reasonably necessary under the circumstances." San Diego Sheriff's Office, Policy & Procedure Manual, Procedure Section, Rule 2.49, *available at* https://www.sdsheriff.net/documents/pp.pdf. In extended "Use of Force Guidelines" that form an addendum to the written policy, the San Diego County Sheriff again emphasizes that officers should "choose the available force option, which is reasonable and necessary for the circumstances at the time." *Id.* at Addendum Section F. The guidelines also set forth factors that correctional officers should consider when determining what level of force to apply. *Id.* Those factors include the age of the detainee, his physical characteristics and condition, and the act that the detainee intends to carry out. *Id.* The addendum does not take into account the correctional officer's subjective intent. *Id.* On the contrary, it provides instructions on particular steps that correctional officers must take in response to a wide variety of situations in which use of force may be necessary. In so doing, the written policies remove the correctional officer's subjective intention from the analysis of whether force should be used.

Similarly, the Philadelphia Prison System has instituted an objective use-of-force policy, requiring officers to use only that force which is reasonable and necessary based on the totality of the circumstances to perform a lawful task. See Philadelphia Procedures, *supra* n.6. This jail policy defines "excessive force" as "the application of an

unreasonable amount of force beyond what is necessary in a given incident based on the totality of the circumstances." *Id.* Again, the rule does not take into account the subjective intent of the officer applying force.

Likewise, the Cook County Jail in Chicago—one of the largest single-site pretrial detention facilities in the country—has instituted an objective use-of-force policy. This policy, like others, instructs officers to use only the force reasonable and necessary based on the totality of the circumstances. Cook County Orders, *supra* n.6.

In smaller jails, too, written policies governing the use of force impose an objective standard. At the Bexar County Jail in San Antonio, Texas, correctional officers are required to use an "amount and degree of force which is reasonable and necessary, under the circumstances." Bexar County, Texas, Sheriff's Office, Manual of Policy and Procedures § 9.02, *available at* http://images.bimedia.net/documents/SHERIFFS+policy+and+procedure.pdf. Bexar County's written policies allow the use of force only when it is necessary to accomplish a legitimate purpose, such as protection of other detainees from unlawful violence. *Id.* Although the Bexar County policies recognize that there are a "boundless variety of situations" in which correctional officers can appropriately use force, the use-of-force policies do not permit consideration of the responding officer's state of mind whatsoever. *Id.* §§ 9.01-9.02. Many

other jurisdictions have promulgated similar standards.[7]

2. Many States direct their jails by statute or regulation to adopt objective standards governing the use of force. Texas, Pennsylvania, Georgia, and Illinois have some of the most populous jails, and together house more than 15 percent of all pretrial detainees in the nation.[8] Each of these States

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[7] *E.g.*, Boulder County, Colorado, Sheriff's Office, Policy and Procedures Manual § 502, Use of Force, *available at* www.bouldercounty.org/doc/sheriff/bcsopolicy.pdf; Daviess-DeKalb Regional Jail, Missouri, Policy and Procedure Manual, Chapter 20.1, Offender Management—Use of Force and Restraints, *available at* http://ddcrj.com/linked/policy%20and%20procedure%20manual.pdf; El Paso County, Texas, Sheriff's Office, Policy and Procedure Manual, No. 501, Use of Force, *available at* http://www.epcsheriff.com/sites/default/files/assets/Documents/Policy/500/501_Use_of_Force.pdf; Pima County, Arizona, Sheriff's Department Rules and Regulations, Chapter 3, Major Policies, *available at* http://www.pimasheriff.org/index.php/download_file/-/view/40/?phpMyAdmin=IPNjP5VxgDObOoAA8mhIHjviA26&phpMyAdmin=dinbYJEBiCOx0uBqCPRcFtH7KOc; Placer County, California, Sheriff's Office, Corrections Division Policy Manual § 1-10, *available at* http://www.loevy.com/Kingsley/Amici/Placer-County-Use-of-Force-Policy.pdf; Solano County, California, Use of Force Policy, Practices & Procedures § 9.13, *available at* http://www.loevy.com/Kingsley/Amici/Solano-County-Use-of-Force-Policy.pdf; Whatcom County, Washington, Code § 1.28.110, *available at* http://www.codepublishing.com/wa/whatcomcounty/html/whatco01/Whatco0128.html#1.28.110.

[8] These States had a total jail population of 117,149 as of June 30, 2013. Texas had 38,797 pretrial detainees on that date; Pennsylvania had 33,056; Georgia had 28,634; and

requires its jails to adopt objective standards governing the use of force against pretrial detainees. See VERNON'S TEX. CODE ANN., Penal Code § 9.53 ("An officer or employee of a correctional facility is justified in using force against a person in custody when and to the degree the officer or employee reasonably believes the force is necessary to maintain the security of the correctional facility, the safety or security of other persons in custody or employed by the correctional facility, or his own safety or security."); Penn. Admin. Code § 95.241(2)(i) ("Force shall be restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to effect compliance with the rules and regulations of the facility when other methods of control are ineffective or insufficient and only the least amount of force necessary to achieve that purpose is authorized."); GA. JAIL STANDARDS COMM'N, *supra*, § 4.23 ("Facility policy shall restrict the use of physical force by facility personnel to that amount necessary for justifiable self-protection, protection of property and prevention of escapes . . . ."); Ill. Admin. Code § 701.140(k) ("The least force necessary under the circumstances shall be employed.").

Illinois had 16,662. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, ANNUAL SURVEY OF JAILS, 2013 (2015), *available at* http://doi.org/10.3886/ICPSR35517.v1.

Other States have implemented similar objective standards governing the use of force in jails statewide. See, *e.g.*, Department of Rehab. & Corr., Standards for Jails in Ohio, Rule 5120:1-8-08(10), *available at* http://www.drc.ohio.gov/web/2014JailStandards.pdf; Neb. Admin. Code § 81.003.03A; Maryland Comm'n on Correctional Standards, Adult Detention Center Standards Manual § .01(A), *available at* http://www.dpscs.state.md.us/publicinfo/publications/pdfs/MCCS/StandardsManual-ADC-02-2012.pdf.

3. Consistent with best and actual practices, the federal government also has adopted objective use-of-force standards for pretrial detainees. The *Use of Force and Application of Restraints Policy* for the Federal Bureau of Prisons limits use of force to "only that amount of force necessary" to achieve a specific, enumerated objective, such as gaining control of the inmate or protecting another inmate's safety. U.S. DEP'T OF JUSTICE, *Use of Force and Application of Restraints*, Policy No. P5566.06 (Nov. 30, 2005). The implementing information for this regulation, which recognizes that jailers need "guidance and instruction on appropriate procedures when confronted with situations that may require the use of force to gain control of an inmate," makes clear that "[a]n employee may not use brutality, physical violence, or intimidation toward inmates, or use any force beyond that which is reasonably necessary to subdue an inmate." *Id.* Again, objective language governs whether use of force against a pretrial detainee is appropriate, and the written policies do not take account of the officer's subjective state of mind. See *id.*

In its supervisory role, the DOJ has consistently advised local jailers that evaluation of uses of force should be based on an assessment of whether the response to a threat was reasonable—a proportional use of force—rather than the officer's intent. For example, the DOJ's first findings issued in relation to inappropriate uses of force at the Orleans Parish Jail in New Orleans, Louisiana state: "Generally accepted correctional practices provide that appropriate uses of force in a given circumstance should include a continuum of interventions, and that the amount of force used should not be disproportionate to the threat." Letter from Loretta King, Acting Assistant Attorney General, Civil Rights Division of the U.S. Department of Justice, to Marlin N. Gusman, Orleans Parish Criminal Sheriff (Sept. 11, 2009) ("Orleans Parish Letter 1"), *available at* http://www.justice.gov/crt/about/spl/documents/parish_findlet.pdf. This view was set out again when Orleans Parish failed to adequately reform its jail. See Letter from Jonathan M. Smith, Chief, Special Litigation Section, Civil Rights Division of the U.S. Department of Justice, to Marlin N. Gusman, Orleans Parish Criminal Sheriff (Apr. 23, 2012) (requiring that "any force used be proportionate to the threat posed by the prisoner") ("Orleans Parish Letter 2"), *available at* http://www.justice.gov/crt/about/spl/documents/parish_update_4-23-12.pdf.

Other federal agencies have set objective standards for the use of force as well. The Department of Homeland Security, which oversees the detention of immigration detainees, has adopted a similar objective standard, grounded in

"reasonableness," which governs the use of force against those detainees. See, *e.g.*, U.S. Immigration and Customs Enforcement, National Detention Standards, at 1 (2000), *available at* http://www.ice.gov/doclib/dro/detention-standards/pdf/useoffor.pdf ("When a detainee acts violently or appears on the verge of violent action(a), if necessary, staff shall use reasonable force and/or restraints to prevent him/her from harming self, others, and/or property.").

4. A natural consequence of the promulgation of objective written policies governing the use of force against detainees is that jailers who must use force are already trained, supervised, and disciplined based on objective standards. They are taught to constrain their use of force to the minimum amount necessary based on the facts before them. When uses of force are deemed unreasonable in light of legitimate goals, correctional officers are disciplined by superiors.

The undersigned *amici* are unaware of any correctional institution in the nation that considers whether the correctional officer acted recklessly in deciding whether a use of force violated policy and requires discipline. A disciplinary process that considers subjective intent would create inconsistent outcomes and compromise correctional institutions' ability to supervise staff effectively. Uniform application of an objective standard will help to ensure that force is managed in jails.

Most importantly, the near uniformity of objective standards for use of force in the written policies of jails throughout the country means that

adopting the Petitioner's proposed objective standard will not upset the operation of local correctional facilities.

III. OBJECTIVE STANDARDS HELP TO ENSURE ACCOUNTABILITY IN JAILS WHERE EXCESSIVE FORCE IS A PROBLEM

Despite both widespread professional consensus that objective standards should govern the use of force against detainees and the implementation of those standards in jails across the nation, there are routinely instances where officers use excessive force against detainees. In some institutions, uses of excessive force are ubiquitous and deeply rooted in the facility's history and culture. Those situations often require outside intervention, typically by the courts or the DOJ. Reform of such systemic failures is achieved by enforcing objective use-of-force standards. In addition, even in situations where excessive force is not pervasive, institutions rely on objective standards to ensure staff accountability. This Court would hinder reform efforts and undermine jail oversight by using subjective criteria to evaluate whether a correctional officer's use of force violates the Constitution.

1. Monitors charged with reforming jails where excessive force is endemic routinely implement objective use-of-force standards to bring about improvements. In New Orleans, as discussed above, the DOJ has twice found that there is a pattern of excessive force at the jail. See Orleans Parish Letter 1, *supra*, at 7-10; Orleans Parish Letter 2,

supra, at 8-10. In this context, the DOJ described the problem with a subjective standard: "staff are left to their own subjective interpretations, which results in inconsistent use and reporting on use of force." Orleans Parish Letter 1, *supra*, at 8. The introduction of subjective standards governing the use of force invites uncertainty and individualized discretion, which is fertile ground for unchecked abuses. Objective standards, by contrast, are a bulwark against the repeated use of excessive force.

As in New Orleans, federal monitors recently have intervened to stop widespread use of excessive force against detainees at jails in the nation's two largest cities—New York and Los Angeles. In both cases, efforts to curb excessive force focus on enforcement of objective standards. The implementation plan for the Los Angeles County Jail, described above, called for an objective standard, see Implementation Plan, *supra*, and now the jail's policy governing the use of force restricts force to "that which is objectively reasonable." L.A. County Jail, Use of Force Policy, *supra* n.6, § 3-10/020.00. In fact, the policy prohibits "unreasonable force," which is defined as "force that is unnecessary or excessive given the circumstances presented to Department members at the time the force is applied." *Id.* § 3-10/030.00.

Similarly, in New York, federal authorities found that "Rikers staff utilize[d] physical force to punish adolescent inmates for real or perceived misconduct and as a form of retribution, in violation of the Department's policy." Letter from Jocelyn Samuels, Acting Assistant Attorney

General, Civil Rights Division of the U.S. Department of Justice and Preet Bharara, U.S. Attorney for the Southern District of New York, to Bill de Blasio, Mayor of New York (Aug. 4, 2014), *available at* http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf. In response, the DOJ advised staff to "strengthen the department's use of force directive" by enforcing objective standards that limit force to "reasonable method[s] of control" and provide that "the force must be proportionate to the threat." *Id.*

Common among these reform efforts is an effort to remove a correctional officer's subjective consideration from the calculation of whether to use force. Adopting a more permissive constitutional standard for the use of force against detainees—one that considers the mindset of the correctional officer—will undermine these and similar reform efforts. In fact, adopting a subjective constitutional standard for using force against detainees risks undoing substantial reforms that have successfully limited the use of force in our county's jails, improving staff and detainee safety.

2. Clear, enforceable standards ensure that jail staff members know what they can and cannot do, and they guarantee that officers who use excessive force can be held accountable for their actions. Accountability, in turn, prevents systemic problems with the use of excessive force—such as those seen in New York, Los Angeles, and New Orleans—and it protects against the spread of such systemic abuses to other institutions.

Adopting a subjective constitutional standard for evaluating the use of force against detainees will upset jail staff training, oversight, and discipline. Most immediately, a subjective constitutional rule will interference with the safe administration of jails because of its negative effect on staff accountability. For one, a subjective standard is more difficult to enforce because it is vague and invites individual discretion. These problems are the reason that appointed monitors always implore jails to develop clear, objective policies dictating when force is permitted and when it is not. See, *e.g.*, Samuels Ltr., *supra*, at 53.

In addition, a subjective standard would erode staff accountability because instances of excessive force would be more difficult to discipline. If a jail staff member can cure an otherwise unreasonable use of force by saying that he did not behave recklessly or with malice, then a new and formidable barrier to staff accountability will have been erected. Unlike the question whether conduct was reasonable given the circumstances, jail administrators have an exceedingly difficult time examining a staff member's subjective intentions. *Amici* expect that instances of excessive force in jails would only increase if the constitutional standard for using force against pretrial detainees is based on subjective intent.

CONCLUSION

For the foregoing reasons, the Court should rule in favor of the Petitioner.

Respectfully submitted,

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IN THE
Supreme Court of the United States

MICHAEL B. KINGSLEY,
Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF INDIANA, ARIZONA, DELAWARE, HAWAII, ILLINOIS, MICHIGAN, NEW HAMPSHIRE, PENNSYLVANIA, SOUTH CAROLINA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Must a pretrial detainee prove both objective unreasonableness and subjective malicious intent to establish a claim for unconstitutional excessive force?

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Arizona, Delaware, Hawaii, Illinois, Michigan, New Hampshire, Pennsylvania, South Carolina, and Wisconsin respectfully submit this brief as *amici curiae* in support of Respondents. At least 20 States house pretrial detainees in State correctional facilities alongside convicted prisoners. Pretrial detainees are transferred to State facilities for any number of reasons, including alleviating overcrowding in local jails and removing detainees from jail environments where they have been subjected to—or even the cause of—security threats. State and local cooperation in the housing of pretrial detainees is critical to maintaining safe and secure correctional facilities in the most economical way possible.

Because pretrial detainees are often mixed with the general population of convicted prisoners in State correctional facilities, States have an interest in ensuring that prison officials may operate under a clear and consistent constitutional standard when dealing with both populations. The Court has said that convicted inmates may assert valid Eighth Amendment claims only where excessive force is undertaken "maliciously and sadistically for the very purpose of causing harm," and *not* where the force arises from "a good faith effort to maintain or restore discipline." *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (quotation omitted). The *amici* States, who share with local governments the practical, substantial concerns of dealing with mixed inmate populations, urge the Court to adopt a substantially

similar standard for addressing pretrial detainee excessive force claims. Functionally distinct excessive force standards for different inmate groups would interfere with State and local strategies for maximizing safety, security, and economy in housing inmates.

Some *amici* States also have an interest in the standard for detainee excessive force claims because they house civil as well as criminal detainees. In Illinois, for example, individuals who have been convicted of sex offenses but have served their sentences may be involuntarily, civilly committed as sexually violent persons and held in a "secure facility" operated by the Illinois Department of Human Services. *See* 725 ILCS 207/50. Institutional safety and security concerns are equally present in this type of facility as they are in prisons and jails. The *amici* States urge clarification of the proper constitutional standard for *all* non-convict detainees.

SUMMARY OF THE ARGUMENT

Pretrial detainees occupy a unique position within the criminal justice system: they have not been convicted of any crime, yet they are incarcerated. What is more, detainees are frequently commingled with the general population of convicted prisoners in both State and local correctional facilities. The similarity of their circumstances makes it reasonable to hold detainees and convicted prisoners to a substantially similar

constitutional standard when it comes to proving excessive force claims under Section 1983.

By the fact of their incarceration, detainees share more in common with convicted prisoners than with free citizens. Both populations receive due process with respect to the decision to incarcerate them, though that process varies in degree. And detainees can pose just as great a security threat as convicted prisoners. They exist within the same volatile, highly-charged correctional environment as the general convict population and are subjected to all the same tensions and conflicts inherent within that setting. Furthermore, many detainees are incarcerated because they have been charged with serious crimes, which is why they cannot make bail. Accordingly, the detainee population tends to comprise a greater number of dangerous and violent offenders than the general population of local jails.

When altercations arise between and among these populations, it is unreasonable to expect correctional officers in the heat of the moment to take account of whether they are dealing with a detainee or a convict. The need to restore order is paramount. Applying a subjective Eighth Amendment standard to convicts and an objective Fourth (or even Fourteenth) Amendment standard to detainees would only create confusion in a situation where officers will not know at a glance which inmates are entitled to a greater level of protection than others.

Visual cues—such as different colored jumpsuits for detainees—may help solve the identification problem, but would raise a host of other issues. In an altercation between a convict in an orange jumpsuit and a detainee in a green jumpsuit, an officer's concern for his own liability may lead him to overcompensate in favor of the detainee at the expense of the lesser-protected convict. Moreover, color-coding—and the perception of special treatment that goes along with it—could lead to jealousy and conflict within the inmate population.

What is more, physically separating detainees from convicts is not a viable option in many circumstances. Detainees comprise 62% of the total jail population in the United States. Housing them in separate quarters would require many local correctional facilities to undertake extensive and costly renovations or new construction. With limited city and county budgets and competing demands on local government resources, the reality is that often there is no choice but to house detainees alongside convicts. The constitutional standard adopted by this Court should take that reality into account.

Nor does the Fourth Amendment and its purely objective standard apply as a textual or doctrinal matter. The Court has said that the notion of a Fourth Amendment "seizure" is limited to initial police encounters, not ongoing detention following formal arrest and arraignment. And in no event is there support for Petitioner's unworkable theory that a detainee is seized anew with each "physically intrusive" action by a correctional officer. It cannot

be that a correctional officer might potentially face a claim for "unreasonable" force with each attempt to move an incorrigible detainee.

Instead, protection for pretrial detainees from excessive force arises from the Fourteenth Amendment's Due Process Clause, which generally affords substantive limits against egregious government conduct. Such claims generally require an element of subjective malicious intent, and there is no reason to depart from that standard here. Requiring detainees to show subjective malice to support excessive force claims would both recognize that "courts are ill equipped to deal with the increasingly urgent problems of prison administration," *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), and have the salutary effect of echoing the Eighth Amendment standard applicable to convicted prisoners. Indeed, as that standard derives from the due process claims of pretrial detainees, *see Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), the Court should take this opportunity to reconnect its excessive force doctrine with its due process origins.

ARGUMENT

I. Correctional Environments Prompt Special Concerns Equally Applicable Both to Pretrial Detainees and Convicted Prisoners

A. Detainees share more in common with prisoners than free persons

Pretrial detainees and convicted prisoners should have substantially similar standards for proving excessive force claims because they share the only characteristic of constitutional significance in this context: both groups comprise lawfully incarcerated persons. While detainees are similar to free persons in that both groups enjoy a presumption of innocence, that presumption "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (explaining that the presumption is "axiomatic and elementary" law, but operates solely *at trial*). As a result, the constitutional-rights gap between detainees and free persons is much wider than the gap between detainees and convicted prisoners, rendering similar treatment of the latter populations reasonable as a matter of principle, as well as practical necessity.

1. Like convicted prisoners, pretrial detainees receive due process with respect to the decision to incarcerate them, though obviously that process varies in degree. With respect to pretrial detainees, a judge determines in a probable cause hearing that the detainee was legitimately arrested and must be

"committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial." *Bell*, 441 U.S. at 546 n.28; *see also id.* at 536. At that point, the facility may "employ devices that are calculated to effectuate this detention[, which] results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial." *Id.* at 537.

For both detainees and convicts, the process of incarceration is comprehensive. A typical intake procedure includes "assigning the detainee an identification number, taking his picture and fingerprints, collecting any property carried by the detainee, conducting a personal history interview, performing a psychiatric screening, assigning the detainee to a division within the jail, conducting a medical examination, and a strip search." *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511, 513 (7th Cir. 2009).

Incarceration is necessary at least in part to ensure that the detainee shows up at trial. As the Court has explained, however, the far more important consideration once the detainee is part of the correctional population is that "[t]he Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained." *Bell*, 441 U.S. at 540. Such measures are not "punishment," *see id.*, but merely further the "essential goals" of "maintaining institutional security and preserving internal order and discipline . that may require limitation or

retraction of the retained constitutional rights of *both* convicted prisoners and pretrial detainees." *Id.* at 546 (emphasis added).

A detainee's status as an *inmate* of a correctional facility is sufficient by itself to justify a more searching review of excessive force claims than would apply to the claims of a free citizen or arrestee. *See id.* at 537 ("Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility."); *id.* at 547 (explaining that "even when an institutional restriction infringes a specific constitutional guarantee, . . . the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security").

2. There are other good reasons to treat pretrial detainees more like convicts and less like free persons. The Court observed in *Bell* that "[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates[; i]ndeed, it may be that in certain circumstances they present a *greater* risk to jail security and order." *Id.* at 546 n.28 (emphasis added). *See also Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1520 (2012) ("People detained for minor offenses can turn out to be the most devious and dangerous criminals.").

Consider the severity of offenses alleged against detainees: nearly 35% are charged with violent offenses, 23% with drug offenses, 22% with property offenses, and 20% with public-order offenses. Doris

J. James, U.S. Dep't of Justice, *Profile of Jail Inmates, 2002*, at 3 (rev. Oct. 12, 2004), http://www.bjs.gov/content/pub/pdf/pji02.pdf. The population of detainees is likely to comprise a greater number of dangerous individuals because bail generally is set higher and is harder to meet for more serious crimes. In comparison, convicts serving time in jails are less likely to be associated with violent offenses, most likely because those with longer sentences serve time in State prison. *See id.* (stating that less than 22% of convicts committed violent offenses.).

What is more, detainees represent high rates of recidivism. *See id.* at 7 (reporting that in 2002, 30.7% of detainees were violent recidivists and another 26.9% were non-violent recidivists); *see also Bell*, 441 U.S. at 546 n.28 (cautioning that detainees "may in many cases be individuals . . who have prior records"). *Cf.* Thomas H. Cohen, U.S. Dep't of Justice, *Pretrial Detention and Misconduct in Federal District Courts, 1995-2010*, at 6 (2013), http://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf (noting similar recidivism statistics at the federal level). "For most communities, those arrested have been arrested before, and a very small number of arrestees are making up a large majority of the arrests." Nat'l Ass'n of Counties, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* 4 (2009), http://www.naco.org/newsroom/pubs/Documents/Health, Human Services and Justice/Jail Population Management Guide.pdf.

Such practical considerations should bear on the applicable constitutional standard. A Fourteenth

Amendment standard with a subjective element similar to the Eighth Amendment standard respects the Court's observation that "[p]rison administrators . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547.

B. Separately housing or visibly identifying detainees and convicts for purposes of carrying out two different constitutional standards would be costly and risky

1. Correctional facilities do not operate in an ideal world where detainees are easily and effectively separated from convicts. In fact, the opposite is true: in the vast majority of jurisdictions, detainees are housed alongside convicts at county or city jails. *See* Todd D. Minton & Daniela Golinelli, U.S. Dep't of Justice, *Jail Inmates at Midyear 2013–Statistical Tables* 7 tbl.3 (2014), http://www.bjs.gov/content/pub/pdf/jim13st.pdf. Of a total nationwide jail population of 731,208 persons in 2013, 62% were detainees and 38% were convicts. *Id.* at 1, 7.

This commingling of inmate populations occurs both within local jails and within State correctional facilities. In Indiana, for example, pretrial detainees are sometimes transferred to State facilities pursuant to Indiana Code Section 35-33-11-1—the "Safekeeper Statute"—which permits transfer if "an inmate in a county jail awaiting trial is in danger of serious bodily injury or death or represents a

substantial threat to the safety of others." In a recent, high-profile use of this statute, a man accused of killing an Indianapolis police officer was transferred from the Marion County Jail to a State correctional facility because his attorneys were concerned for his personal safety during the nearly two years it will take for his case to go to trial. Matt Adams, *Court Docs: Man Accused of Killing IMPD Officer Perry Renn to Be Moved to State Prison*, Fox59.com (Mar. 20, 2015), http://fox59.com/2015/03/20/court-docs-man-accused-of-killing-impd-officer-perry-renn-to-be-moved-to-state-prison/.

Indiana's Safekeeper Statute is not unique. Fifteen other States possess a similar law. *See, e.g.*, Cal. Penal Code § 4007; Idaho Code Ann. § 20-604; Iowa Code Ann. § 812.6; Ky. Rev. Stat. Ann. § 441.540; Me. Rev. Stat. Ann. tit. 34-A, § 1405; Md. Code Ann., Corr. Servs. § 9-303; Mich. Comp. Laws Ann. § 801.55(g); Minn. Stat. Ann. § 243.91; Nev. Rev. Stat. Ann. § 209.311; N.H. Rev. Stat. Ann. § 21-H:8; N.M. Stat. Ann. § 33-3-15; 61 Pa. Cons. Stat. Ann. § 1151(a); S.C. Code Ann. § 24-5-210(C); Vt. Stat. Ann. tit. 28, § 702; Va. Code Ann. § 53.1-21. Only Florida categorically prohibits transferring pretrial detainees to state-run correctional facilities. Fla. Stat. Ann. § 944.17.

While Indiana's law permits transfer only for safety reasons—a detainee's need for medical care, for example, is not a valid justification for transfer, Ind. Code § 35-33-11-1—other State laws authorize transfer for any reason at all (*see, e.g.*, Idaho Code Ann. § 20-604) or only for very specific reasons (*see,*

e.g., Ky. Rev. Stat. Ann. § 441.540 (allowing transfer only in the event of "threatened violence or intense feeling and public indignation" toward a detainee)). Some laws limit transfers to certain populations. *See* Iowa Code Ann. § 812.6 (incompetent persons); Minn. Stat. Ann. § 243.91 (women). And several States—including Alaska, Connecticut, Delaware, Hawaii, and Rhode Island—have no need of safekeeping laws because they have "unitary" correctional systems in which the State manages both prisons and jails. *See* Brian Albert, Nat'l Ass'n of Counties, *State Prisoners in County Jails* (2010), http://www.naco.org/newsroom/pubs/Documents/Health, Human Services and Justice/State Prisoners in County Jails Updated.pdf.

2. Correctional officers must ensure the safety of all inmates as well as prison officials and staff, to say nothing of the general public. *Bell*, 441 U.S. at 547 ("Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel . ."). Subjecting classes of intermingled inmates to different constitutional excessive-force standards would be unreasonable.

First, correctional officers will not necessarily know at first glance which inmates are pretrial detainees and which are convicts. Accordingly, more protective constitutional standards for detainees may prompt correctional officers to subordinate safety and security concerns to personal liability concerns when dealing with *all* inmates. Making a mistake as to which inmates are entitled to greater protection may be too great a risk. The Court

recently addressed an analogous situation in *Florence v. Board of Chosen Freeholders of County of Burlington*, where the Court rejected a proposal that prisons classify inmates by current and prior offenses so as to exempt detainees arrested for minor offenses from invasive bodily searches at intake. 132 S. Ct. at 1514–15. The Court observed that such a rule would require officers to make "legal determinations during the intake process," and that "[t]o avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population." *Id.* at 1522. The same sort of risk would arise with different treatment standards for different classes of inmates.

Second, while it might be theoretically possible to use different-colored jumpsuits to identify different classes of inmates, doing so introduces distracting issues of both enforcement and inmate morale. Color-coding already happens in some facilities to identify different groups among the convict population including, among others, gang members, gang dropouts, inmate workers, and inmates under protective custody. *See* Victor A. Patton, *Inmates' Colors Identify and Protect*, Modesto Bee (Oct. 15, 2007), http://www.modbee.com/news/local/article3094425.html. With respect to these segments of the inmate population, color-coding aids correctional officers in keeping problematic populations apart and quickly pinpointing unauthorized movement. *See id.* An officer would know, for example, that inmate workers in tan jumpsuits are allowed more freedom of movement

than other inmates. And red and blue jumpsuits—signifying rival gang affiliations—alert officers to the need to keep these inmates apart. The color-coding system recognizes the safety benefits arising from easy visual identification of inmate traits that may engender conflict or cause safety concerns.

Requiring pretrial detainees to wear different colored jumpsuits to signify their specially protected status, however, may give rise to jealousies and other inmate frictions that can only jeopardize safety and security even further. *Cf. O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (recognizing that "special . . . arrangements for one group would create problems as other inmates . . perceive favoritism" (internal quotation marks omitted)). The mere *perception* of special treatment is a "legitimate security concern[]" for correctional facilities. *See, e.g., DeHart v. Horn*, 227 F.3d 47, 53 (3d Cir. 2000) ("[I]t is not irrational to think that providing [an inmate] with a vegetarian diet to accommodate his religious beliefs might involve some risk of inmate jealousy."); *Iron Eyes v. Henry*, 907 F.2d 810, 815 (8th Cir. 1990) (observing that exceptions to prison regulations on hair length can lead to "prisoner friction and unrest").

Third, even if jails and prisons were to identify different classes of prisoners with different-colored jumpsuits, when major riots erupt—such as in Indiana's New Castle Correctional Facility in 2007 or Pendleton Correctional Facility (then known as

the Indiana Reformatory) in 1985[1]—prison guards and law enforcement responders should not be guided in their efforts to restore order by the color of inmate jumpsuits. Such considerations would not only interfere with law enforcement strategies to restore order at a general level, but might even create incentives for law enforcement to target lesser-protected inmates more than others.

And more frequently, when prison officials encounter smaller-scale but still-dangerous incidents, it is equally critical to reestablish security. Correctional facilities are volatile, charged environments where altercations—both among inmates and between inmates and officers—are inevitable and frequent. Officers are trained to use force responsibly and only where absolutely necessary. *See, e.g.*, Ind. Dep't of Corr., Policy No. 02-03-117, *DOC Correctional Police Officer* 9 (2011), http://www.in.gov/idoc/files/02-03-117_DOC_Police_Officer_AP_7-1-11.pdf ("Correctional Police Officers shall only use that amount of physical force necessary to control the situation and ensure the safety and security of all persons involved.") Situations can escalate quickly, however, and require officers to act based on split-second decisions that, in hindsight, may appear unreasonable but that did not stem from any malicious intent.

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[1] Associated Press, *Indiana Prison Riot Quelled*, USA Today (Apr. 24, 2007), *available at* http://usatoday30.usatoday.com/news/nation/2007-04-24-prison-riot_N.htm; *Trotter v. State*, 559 N.E.2d 585, 586-87 (Ind. 1990) (describing 1985 Indiana Reformatory riot).

Reestablishing security under these circumstances would be hampered by having to pause to consider separate standards for different classes of inmates.

3. It would be not only administratively cumbersome, but likely cost-prohibitive, to separate detainees into separate facilities from convicted prisoners. Doing so would likely require building additional jails or expanding existing ones at great taxpayer expense.

For example, the New Orleans Sheriff has proposed a $56 million facility providing 380 beds for inmates with mental illnesses. Jim Mustian, *Gusman Pushes for New Jail Building*, Advocate, Aug. 5, 2014, http://theadvocate.com/news/neworleans/neworleansnews/9880028-123/gusmans-proposed-new-jail-could. The city had been ordered to find a home for its "most mentally disturbed inmates" as part of a consent decree to improve jail conditions. *Id.*

Maryland recently abandoned plans to build a new juvenile facility that would have cost $70 million for only 120 beds. Yvonne Wenger, *State Scraps Plans to Build Youth Jail in Baltimore*, Baltimore Sun, Jan. 16, 2013, http://articles.baltimoresun.com/2013-01-16/news/bs-md-youth-jail-plans-20130116_1_youth-jail-angela-conyers-johnese-treatment-facility. A new $73 million plan aims to create more treatment programs and renovate a smaller facility for juveniles charged as adults who are incarcerated along, but by law separate from, adult offenders. *Id.*

And in 1999, Ulster County, New York began construction of a 484-bed facility projected to take five years and cost around $75 million, but that project suffered a three-year delay and $20 million in overruns. Dana Kaplan, *Impacts of Jail Expansion in New York State: A Hidden Burden* 7–8 (2007), http://www.prisonpolicy.org/scans/ImpactsofJailExpansion_NYS.pdf. What is more, the county is embroiled in litigation with facility contractors, and its citizens have been forced to foot a 40% increase in property taxes. *Id.* at 8.

Again, pretrial detainees comprise 62% of the overall jail population in the United States. Minton & Golinelli, *supra*, at 1, 7. It would be a massive undertaking, both in terms of logistics and costs, to build new facilities or renovate existing ones in order to separate detainees from the general inmate population. The reality facing most correctional facilities, therefore, is that detainees must coexist alongside convicted prisoners. In that situation, Plaintiffs' theory would require correctional officials to track and operationalize the specific constitutional protections applicable to each inmate. Such a system places too great a burden on these officials, who already face "Herculean obstacles to [the] effective discharge of the[ir] duties . . " *Procunier*, 416 U.S. at 404–05.

II. The Fourth Amendment Does Not Apply to Pretrial Detainees' Excessive Force Claims Because Detainees Are Not "Seized" Within the Meaning of the Amendment

Petitioner argues that it does not matter whether the Court evaluates pretrial detainees' excessive force claims under the Fourth Amendment or the Due Process Clause because "the fundamental rule is the same" under both: pretrial detainees need only make an objective showing of unreasonable force. Pet Br. 13. As the Court has instructed, however, it is critical in the context of an excessive force claim to "identify[] the specific constitutional right" at issue. *Graham v. Connor*, 490 U.S. 386, 394 (1989). Applying the Fourth Amendment to pretrial detainees' excessive force claims would be improper as a matter of text, doctrine, and practicality.

The Fourth Amendment does not require a separate reasonableness analysis for every action taken by the jailer as part of the detention process. Rather, the Fourth Amendment is concerned with "'the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails,' . [not] with the conditions of ongoing custody following such a curtailment of liberty." *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997) (quoting *Bell v. Wolfish*, 441 U.S. 520, 533–34 (1979)), *abrogated on other grounds by Wilkins v. Gaddy*, 559 U.S. 34 (2010).

Petitioner disagrees, arguing that pretrial detainees are seized for Fourth Amendment

purposes either by way of a "continuing seizure" lasting throughout the course of their detention, Pet. Br. 29, or as a result of *new* seizures that occur each time a detainee is subjected to any "physically intrusive" action by an officer. *Id.* ("[S]tate officials' actions against a detainee that are 'physically intrusive' such that they constitute a new seizure—that is, a seizure different from, or in addition to, the existing lawful detainment—are governed by the Fourth Amendment standard."). Neither theory is persuasive.

Petitioner's "continuing seizure" theory derives from Justice Ginsburg's concurrence in *Albright v. Oliver*, which observed that at common law, "an arrested person's seizure was deemed to continue even after release from official custody" and a person remains "'seized' for trial, so long as he is bound to appear in court and answer the state's charges." 510 U.S. 266, 277–79 (1994) (Ginsburg, J., concurring). The Court has never adopted this theory; to the contrary, it has recognized that "[a] seizure is a single act, and not a continuous fact." *California v. Hodari D.*, 499 U.S. 621, 625 (1991) (holding that a fleeing suspect was not seized until he was physically restrained by the police).

The Fourth Amendment itself "provides weak textual support" for extending its protections past the initial seizure. *Valencia v. Wiggins*, 981 F.2d 1440, 1444 (5th Cir. 1993) ("As the Fourth Amendment protects against unreasonable 'seizures,' it seems primarily directed to the *initial* act of restraining an individual's liberty, such as an

investigatory stop or arrest." (footnote omitted)). The Amendment's particular regulation of warrants—which concern singular acts, not ongoing restraints—suggests that it "is directed at the *arrest* of persons and not at the conditions of their custody." *Riley*, 115 F.3d at 1163. "The requirements for securing a warrant have nothing to tell us about the conditions controlling subsequent detention." *Id.* Thus, by its own terms, the Fourth Amendment's limits on seizures extend no further than "the initial decision to detain an accused." *Bell*, 441 U.S. at 533.

Perhaps recognizing this textual problem, Petitioner proposes an alternative theory that "a state officer's deliberate use of force against a lawfully detained person awaiting trial is a *new* 'seizure' . . . governed by the objective unreasonableness standard of the Fourth Amendment." Pet. Br. 31 (emphasis added). But this rule is unworkable in practice. What amount of force constitutes a new seizure? Is a pretrial detainee newly "seized" when handcuffed to be taken to court? What if a guard places a hand on a detainee while escorting him down a hallway? Certainly this is a "new physical restraint." *Id.* at 32. But surely the Fourth Amendment cannot be triggered every time a correctional officer further restrains an already-restrained detainee.

The cases Petitioner cites have nothing to say about this seizure-within-a-seizure theory. *Terry*, *Garner*, and *Brower* all have to do with *initial* police encounters and hold that an individual is "seized" during such an encounter when no longer free to

walk away. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person."); *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989) (seizure occurs "when there is a governmental termination of freedom of movement").

A pretrial detainee—unlike an arrestee or an individual undergoing an investigatory stop—is at *no* time free to walk away from custody. There are no degrees of freedom in this regard; a detainee cannot be *less* free to walk away from a guard than from the jail itself, such that he is seized anew.

Petitioner does not clarify matters by asserting that "the use of objectively unreasonable force against a pretrial detainee will virtually always constitute . a new seizure within the meaning of the Fourth Amendment." Pet. Br. 29. This is circular reasoning: A pretrial detainee is newly "seized," triggering the Fourth Amendment's objective reasonableness standard, when the detainee is subjected to force that is objectively unreasonable. In other words, a court can find that the Fourth Amendment applies only by first finding a Fourth Amendment violation. This theory of seizure is implausible and unsupported by Fourth Amendment doctrine.

III. The Due Process Clause Provides the Appropriate Standard for Evaluation of Pretrial Detainees' Excessive Force Claims

The proper standard for detainee excessive force claims must reflect the reality that "courts are ill equipped to deal with the increasingly urgent problems of prison administration . . . ." *Procunier*, 416 U.S. at 405. As the Court said in *Bell*, "[p]rison administrators . . should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 441 U.S. at 547. Precisely because prison and jail order and security are nearly always in jeopardy, "[t]he difficulties of operating a detention center must not be underestimated by the courts." *Florence*, 132 S. Ct. at 1515; *see also Rhodes v. Chapman* 452 U.S. 337, 349 n.14. (1981) (observing that a prison's internal security is "peculiarly a matter normally left to the discretion of prison administrators").

Respecting the professional judgment of state and local corrections officials requires a high standard of constitutional liability. Lest the Court invite routine second-guessing of corrections officials, it should require detainees to prove "malicious and sadistic" intent when bringing excessive force claims, just as it requires for convicted prisoners. *Whitley v. Albers*, 475 U.S. 312, 320 (1986). That standard is especially appropriate since it was originally derived from a pretrial-detainee treatment case.

1. Over sixty years ago, in *Rochin v. California*, the Court recognized that substantive due process prevents the government from engaging in conduct that "shocks the conscience." 342 U.S. 165, 172 (1952). It held that pumping a suspect's stomach to obtain evidence violated due process because such conduct did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.*

The Second Circuit applied the *Rochin* standard to a pretrial detainee's excessive force claim in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973). In an oft-quoted opinion by Judge Friendly, the court held that a correctional officer's use of force shocks the conscience where it is applied "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain or restore discipline." *Id.* at 1033. Such factors as "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted" are relevant to that determination. *Id.* Ultimately, however, the *Glick* test turns on a subjective inquiry into the intent of the accused government official and whether that intent was "malicious[] and sadistic[]." *Id.*

This Court has adopted the subjective *Glick* test in the Eighth Amendment context as the proper standard for evaluating convicted prisoners' excessive force claims. In *Whitley v. Albers*, the Court held that "[w]here a prison security measure

is undertaken to resolve a disturbance . . . we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering [in violation of the Eighth Amendment] turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" 475 U.S. at 320–21 (quoting *Glick*, 481 F.2d at 1033). The Court later extended the *Whitley* holding beyond the riot context to "*all* allegations of excessive force" involving convicted prisoners. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (emphasis added).

Significantly, the Court "derived the *Whitley* test from one articulated by Judge Friendly in *Johnson v. Glick* . . a case arising out of a prisoner's claim to have been beaten and harassed by a guard." *Id.* That the "prisoner" in *Glick* was a pretrial detainee was of no relevance to the Court's analysis in *Whitley* and *Hudson*. Rather, the Court recognized in those cases that excessive force claims often arise from circumstances where correctional officers are required to make spur-of-the-moment decisions and immediately weigh competing interests, including the need to protect staff, other government officials, the public, and detainees in a dangerous, dynamic environment. *Hudson*, 503 U.S. at 6; *Whitley*, 475 U.S. at 320. Under these circumstances, a subjective standard gives officers the protection they need to restore order without concerns for their own personal liability taking precedence. *See Whitley*, 475 U.S. at 322 (noting that a subjective-intent standard "does not insulate from review actions taken in bad faith and for no legitimate purpose, but

. requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice").

2. This rationale applies equally no matter the precise legal status of lawfully incarcerated detainees, particularly where they are housed alongside convicted prisoners. The Court recognized as much in *Bell v. Wolfish*, where it applied a subjective due process standard to claims regarding pretrial detainees' conditions of confinement. "Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of *both* convicted prisoners and pretrial detainees." *Bell*, 441 U.S. at 546 (emphasis added). Accordingly, a particular condition of confinement violates the due process clause when it "amount[s] to punishment of the detainee." *Id.* at 535. To this end, "[a] court must decide whether the disability is imposed *for the purpose of punishment* or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538 (emphasis added); *see also Farmer v. Brennan*, 511 U.S. 825, 839 (1994) ("[A] subjective approach isolates those who inflict punishment[.]").

While *Bell* applied only to pretrial detainees' conditions-of-confinement claims, the Court later observed in *Graham v. Connor*—a Fourth Amendment investigatory stop case—that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." 490 U.S. 386, 395 n.10 (1989).

The Court now has the opportunity to confirm what it said in *Graham*, and in the process bring excessive force doctrine full circle and reconnect it to its origins—the due process claims of pretrial detainees. *Whitley*, 475 U.S. at 320–21. That is, because the Eighth Amendment standard derives from Judge Friendly's due process opinion in *Glick*, the due process standard for whether detainee treatment amounts to punishment should be substantially identical. That standard—"whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm," *id.* (internal quotation marks omitted)—would both afford relief in extreme cases and protect State and local interests in efficient prison administration and equal treatment of all incarcerated individuals.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

MICHAEL B. KINGSLEY,
Petitioner,

v.

STAN HENDRICKSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

[1] All counsel of record consented to the filing of this brief by filing blanket consents with the Clerk. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

This case directly impacts the interests of *amici* and their members. Cities and counties across the country operate detention facilities for pre-trial detainees. Imposing a more stringent constitutional standard for the use of force against pre-trial detainees than against post-conviction detainees would threaten the safety of inmates and officers, in addition to saddling these cities and coun-

ties with heavy new compliance and litigation costs. *Amici* thus have a strong interest in this case.

SUMMARY OF ARGUMENT

Amici have first-hand experience with the unique challenges of jail administration. The facts on the ground support applying the same standard regarding the use of force for all inmates, regardless of whether they are pre-trial detainees or post-conviction detainees. Jails generally commingle these two categories of inmates, and the extremely high turnover rate of jails leaves officers little time to become familiar with each individual. Thus, officers operating in tense and rapidly escalating situations do not know whether a particular inmate is a pre-trial detainee or a post-conviction detainee. Further, the level of danger posed by a particular inmate—both to jail officers and other inmates—cannot be predicted based on whether the inmate is a pre-trial detainee or post-conviction detainee. In fact, the data indicate that pre-trial detainees are often more dangerous than the post-conviction detainees housed in jails. That makes sense given that post-conviction detainees in jails generally are serving time for relatively minor offenses whereas pre-trial detainees are awaiting trial for all manner of offenses, including serious and violent crimes.

For all of those reasons, this Court and Congress have treated pre-trial detainees and post-conviction detainees similarly in the inmate-litigation context. This Court should continue that policy and extend officers the same protections whether they are dealing with a pre-trial detainee or a post-conviction detainee. The Eighth Amendment standard has governed excessive-force claims brought by post-conviction detainees for years, and it strikes the right balance between protecting officers acting in good faith and safeguarding an inmate's right to challenge unlawful actions. It gives officers latitude to operate without the fear of undue second guess-

ing under an exclusively objective standard and ensures officers can act quickly and decisively to protect not only themselves, but also the inmates entrusted to their care. That same standard, or something close to it, should govern claims brought by pre-trial detainees under the Fourteenth Amendment as well.

ARGUMENT

I. THE PRACTICAL REALITIES OF JAILS SUPPORT ADOPTING THE SAME STANDARD FOR EXCESSIVE-FORCE CLAIMS BY PRE-TRIAL DETAINEES AND POST-CONVICTION DETAINEES

A. Officers cannot distinguish between pre-trial detainees and post-conviction detainees in jails

The nature of jail administration makes it impossible for officers to apply one standard of conduct to pre-trial detainees and another standard to post-conviction detainees. Jails generally house these two groups of inmates together. Indeed, the National Institute of Corrections recommends a number of criteria for determining where and with whom a correctional facility should house an inmate, taking into account factors such as gang affiliation and disciplinary history. See Austin & Hardyman, National Institute of Corrections, U.S. Dep't of Justice, *Objective Prison Classification: A Guide for Correctional Agencies* 45-46 (July 2004). But whether an inmate is a pre-trial detainee or post-conviction detainee isn't on that list. Those recommendations reflect the reality of jail administration. They also reflect the practical realities that finite building dimensions cannot house infinite categorical distinctions. Jails rely on proven classification systems to ensure the safe confinement of all inmates, and practice has shown that an inmate's conviction status is not a relevant consideration for that purpose. Thus, segregating the jail population based on conviction status would impose steep new costs on jails, especially on small facilities and those operating at or over

capacity, with little or no additional safety in return. The resulting commingling of pre-trial detainees and post-conviction detainees makes it difficult, if not impossible, for officers to distinguish between them.

Jail inmates also are almost evenly split between pre-trial detainees and post-conviction detainees. See Minton & Golinelli, Bureau of Justice Statistics, U.S. Dep't of Justice, *Jail Inmates at Midyear 2013—Statistical Tables* 7 tbl.3 (rev. Aug. 12, 2014) ("*2013 Statistical Tables*"). Thus, an officer often cannot even make an educated guess about the conviction status of any particular inmate. The combination of co-housing and this roughly equal split between pre-trial detainees and post-conviction detainees means that officers have no basis for quickly deducing the conviction status of jail inmates.

Further complicating matters, jails experience rapid turnover in their inmate populations—an average of 60% per week for jails nationwide. See *2013 Statistical Tables* 9 tbl.7. Out of the national jail population of approximately 700,000 inmates, a little over 200,000 of those are new admissions every week, with a roughly equal number of weekly releases. *Ibid.* That results in statistically complete turnover of the jail population every two weeks. "This extremely fast turnover makes jails inherently [] chaotic." Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1686 (2003). And importantly, it deprives officers of adequate time to become familiar with individual inmates so that they can commit the inmates' conviction statuses and personality traits to memory.

All of this means that when an officer confronts a dangerous situation in a jail—be it breaking up a riot or dealing with a defiant inmate—he will almost certainly not know the conviction status of the inmates involved before he must take decisive action. Inmate and officer safety is the highest priority in jails, and ensuring safety means defusing disturbances before they spiral out of control.

There is no time to stop and check the records to determine what standard should govern the use of force against the offending inmates. And thus an officer must apply the same standard to all inmates in these critical situations. The practical realities of jail operation leave no other option.[2]

B. Pre-trial detainees are commonly more dangerous than post-conviction detainees in jails

The data on inmate dangerousness do not support a more restrictive standard for the use of force against pre-trial detainees. This Court has recognized that even "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals." *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1520 (2012). And jails hold not only pre-trial detainees charged with minor offenses, but also suspected murderers and other violent felons who could not make bail or were denied bail. Unsurprisingly, then, the evidence demonstrates the error of assuming that pre-trial detainees are less dangerous than post-conviction detainees. In fact, just the opposite is true, and that is why a more restrictive

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[2] Petitioner-aligned *amici* Former Corrections Administrators and Experts appear to agree that one standard should govern all jail operations, but they prefer the objective standard used by some corrections facilities' policy manuals. See Former Corrections Administrators and Experts' Br. 2-4. That is not a live option, however, because it is well established that the Eighth Amendment's *subjective* standard governs claims by post-conviction detainees. *Whitley* v. *Albers*, 475 U.S. 312, 320-321 (1986). No party has asked the Court to revisit its entrenched Eighth Amendment precedent. Therefore, the only way to apply the same constitutional standard to all inmates is to recognize a subjective standard for excessive-force claims by pre-trial detainees as well. Moreover, as this Court's existing Eighth Amendment precedent shows, the internal jail policies cited by *amici* are not a reliable guide for this Court's task of announcing constitutional standards to be applied by judges and juries.

standard for the use of force against pre-trial detainees flies in the face of the facts on the ground.

The data demonstrate that jails are more dangerous than prisons and that pre-trial detainees in jails present greater security risks than do post-conviction detainees in jails. As one scholar has explained:

> [J]ails are more dangerous than prisons, in large part because of the primary operational difference between the two types of facilities: prisons take and hold inmates while jails take and release them. This extremely fast turnover makes jails inherently more chaotic. More generally comparing jails to prisons, classification of jail inmates is more haphazard, jail routines are less regular, jail time is more idle, and jail inmates are more likely to be in some kind of crisis. Jail inmates are also more likely to be vulnerable to harm in many ways—mentally ill, inexperienced with incarceration, drunk or high, or suicidal.

Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. at 1686 (footnotes omitted).

The heightened danger of jails compared to prisons is partially due to the unique risks posed by pre-trial detainees. Pre-trial detainees who do not post bail are among the most dangerous residents in jails because their crimes are the most serious and they pose the greatest flight risk, resulting in high bail or denial of bail: "Those who are held, though, appear systematically to have observable characteristics that are associated with higher violent-crime rearrest rates. * * * [W]e have strong evidence that those who are held are more dangerous." See Baradaran & McIntyre, *Predicting Violence*, 90 Tex. L. Rev. 497, 538-39 (2012) (presenting data on state court felony defendants in a sample of urban

counties from 1990 to 2006 and concluding that pre-trial detainees were more likely to present a danger to the community than persons released pending trial). The post-conviction detainees in jails, by contrast, are serving short sentences for minor offenses, and are therefore among the least dangerous of all inmates. See, *e.g.*, Wis. Stat. Ann. § 973.02 (providing that generally "a sentence of less than one year shall be to the county jail[and] a sentence of more than one year shall be to the Wisconsin state prisons").[3] As this Court explained in *Bell* v. *Wolfish*:

> In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates.

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[3] See also Fla. Stat. Ann. § 922.051 ("When a statute expressly directs that imprisonment be in a state prison, the court may impose a sentence of imprisonment in the county jail if the total of the prisoner's cumulative sentences is not more than 1 year."); Idaho Code Ann. § 18-111 ("A felony is a crime which is punishable with death or by imprisonment in the state prison. * * * Every other crime is a misdemeanor."); compare Cal. Penal Code § 17(a) (generally classifying a "felony [a]s a crime that is punishable with death or by imprisonment in the state prison") with Cal. Penal Code § 19.2 (generally limiting misdemeanor sentences to one year in county jail); compare Tex. Penal Code § 12.04(a) (classifying felonies into five categories ranging from "capital felonies" to "state jail felonies") with Tex. Penal Code §§ 12.31-12.35 (allowing state "jail" sentences only for "state jail felonies" and otherwise requiring "imprisonment in the Texas Department of Criminal Justice" for felonies) and Tex. Penal Code §§ 12.21-12.23 (including within the available sentences for misdemeanors only "confinement in jail" and excluding confinement in "prison").

> This may be particularly true at facilities * * * where the resident convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted.

441 U.S. 520, 546 n.28 (1979) (citations omitted). Again, statistical evidence supports that pre-trial detainees are particularly dangerous. For example, compared with post-conviction detainees in jails, pre-trial detainees are significantly more likely to be being held for violent offenses, including murder and assault. See James, Bureau of Justice Statistics, U.S. Dep't of Justice, *Profile of Jail Inmates, 2002* 3 tbl.3 (rev. Oct. 12, 2004).

Compounding the risk to jail security associated with pre-trial detainees is the fact that corrections officials have less time to assess the risks presented by any given pre-trial detainee: "Jails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset." *Florence*, 132 S. Ct. at 1521. And even if officers thought they could discern important information about the pre-trial detainee from a split-second assessment, that information would often turn out to be very misleading. *Ibid.* (documenting several instances of pre-trial detainees arrested for minor infractions who turned out to have committed very serious crimes). The result is that officers know dangerously little about any particular pre-trial detainee and often must operate with this incomplete information when they face volatile situations requiring immediate and decisive action.

All of this supports an excessive-force standard for pre-trial detainees that is the same as or similar to that used for post-conviction detainees so that correctional officers can protect their safety and that of inmates in their charge. The facts and the experience of *amici*

demonstrate that pre-trial detainees are often more dangerous than post-conviction detainees in jails, and officers' lack of critical knowledge about the pre-trial detainees compounds the risks faced by all involved. These facts weigh against imposing a more restrictive test for the use of force against pre-trial detainees and underscore the need to give officers the same protections whether they are confronting pre-trial detainees or post-conviction detainees.

II. This Court And Congress Treat Pre-Trial Detainees And Post-Conviction Detainees Similarly In The Inmate-Litigation Context

A. Subjecting pre-trial detainees and post-conviction detainees to the same legal standards is nothing new. This Court treated pre-trial detainees and post-conviction detainees similarly in *Bell*. And while Petitioner suggests that *Bell* supports a purely objective standard for determining excessive-force claims, see Pet. Br. 12, *Bell* actually counsels against such a determination.

In *Bell*, this Court "s[aw] no reason to" "distinguish[] between pretrial detainees and convicted inmates in reviewing the challenged [jail] security practices." 441 U.S. at 546 n.28. The Court recognized "[t]he fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights." *Id.* at 546. This principle "applies equally to pre-trial detainees and convicted prisoners" because the state possesses a legitimate interest in confining both types of inmates and ensuring their safety, as well as the safety of the jail as a whole. *Ibid.* A pre-trial detainee occupies the same position as a post-conviction detainee in this confinement system and is therefore subject to the same limitations on rights: "A detainee simply does not possess the full range of freedoms of an unincarcerated individual. * * * [M]aintaining institutional security and pre-

serving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pre-trial detainees." *Ibid.* (footnote omitted). Thus, the fact of confinement is the key, not the "happenstance" of whether the detainee in question happens to be pre-trial or post-conviction. *Id.* at 547 n.29.

This Court's similar treatment of pre-trial detainees and post-conviction detainees in *Bell* reflects the convergence of interests protected by the Eighth and Fourteenth Amendments in the confinement context. Both seek to ensure that any force directed at an inmate is for the purpose of maintaining order and safety instead of inflicting arbitrary harm. For post-conviction detainees, this Court asks "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-321 (internal quotation marks omitted). For pre-trial detainees, the focus is on whether there was "an expressed intent to punish." *Bell*, 441 U.S. at 538. If not, the question becomes whether the "condition is [] reasonably related to a legitimate goal," because if it is not and is instead "arbitrary or purposeless[,] a court permissibly may infer that the purpose of the governmental action is punishment." *Id.* at 539.

Although the precise language the Court has used in the two contexts differs, both inquiries focus on why the officer used force—the "intent" and "purpose" of the force. That is because both the Eighth and Fourteenth Amendments prohibit inflicting arbitrary or malicious harm on inmates as a means to punish them, regardless of their conviction status. Force is allowed only if directed at maintaining the safe confinement of the inmates—force which is "applied in a good faith effort to maintain or restore discipline," *Whitley*, 475 U.S. at 320-321 (internal quotation marks omitted), or is "related to a

legitimate goal," *Bell*, 441 U.S. at 539. Pre-trial detainees and post-conviction detainees share the common fact of confinement—albeit for different purposes—and the need to maintain this confinement in an orderly and safe manner drives the constitutional analysis for both amendments. As this Court explained in *Bell*, "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." 441 U.S. at 546 (footnote omitted). That is why the Eighth and Fourteenth Amendments impose similar subjective tests in this shared context.

Petitioner misreads *Bell* in claiming that a due process violation can be maintained with purely objective evidence. Petitioner suggests that *Bell* held that "a pretrial detainee can also demonstrate a due process violation by proving that the state's use of force against him was 'excessive in relation to,' or not 'reasonably related to,' a legitimate government interest," and that such a showing amounts to "an objectively unjustified deprivation." See Pet. Br. 12 (quoting *Bell*, 441 U.S. at 539). But at no point does *Bell* suggest that a detainee need not prove an improper motivation to punish; rather, the Court simply held that where the inmate presents no direct evidence of intent, "a court permissibly may infer that the purpose of the governmental action is punishment" if the totality of the evidence warrants such an inference. *Bell*, 441 U.S. at 538-539. Thus, assuming *Bell* applies to excessive-force claims, an inmate might use circumstantial evidence to demonstrate an officer's intent, but that hardly means an inmate can bypass the subjective-intent requirement altogether.

In this way, *Bell* establishes a regime similar to the one that governs Title VII disparate-treatment claims. The "ultimate question in every employment discrimina-

tion case involving a claim of disparate treatment is whether the plaintiff was the victim of *intentional* discrimination." *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000) (emphasis added). But a plaintiff is free to employ "circumstantial evidence" to meet that burden. *Id.* at 147. The inadequacy of a proffered explanation is powerful circumstantial evidence: "Proof that the defendant's [non-discriminatory] explanation is unworthy of credence * * * may be quite persuasive." *Ibid.* Or in other words, like in the Fourteenth Amendment context, if the action is not "reasonably related to a legitimate goal," "a court permissibly may infer that the purpose" was unlawful. *Bell*, 441 U.S. at 539.

B. Congress has also treated pre-trial detainees and post-conviction detainees the same in inmate litigation. The Prison Litigation Reform Act overhauled the procedures governing inmate litigation. See 18 U.S.C. § 3626 (detailing the "[a]ppropriate remedies with respect to prison conditions"); 28 U.S.C. §§ 1915, 1915A (restricting *in forma pauperis* proceedings for prisoners and providing for faster dismissal of unmeritorious prisoner suits); 42 U.S.C. § 1997e (imposing an exhaustion of administrative remedies requirement on § 1983 claims challenging prison conditions and limiting monetary recovery and attorney's fees for such actions). Its key provisions apply to pre-trial detainees and post-conviction detainees alike—to "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." 42 U.S.C. § 1997e(h); 28 U.S.C. §§ 1915(h), 1915A(c); see also 18 U.S.C. § 3626(g)(3) ("any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law"). In enacting these provisions, Congress recognized what this Court had already concluded—that the state's legitimate inter-

est in confining both pre-trial detainees and post-conviction detainees demands similar regulatory regimes for policing the confinement of both types of inmates.

III. Only The Eighth Amendment Standard Provides Adequate Protection For Both Jail Officers And Inmates

A. This Court has repeatedly accorded deference to jail and prison officials due to the profound challenges in running a correctional institution and maintaining a safe environment

This Court has repeatedly recognized that correctional facilities face enormous administrative and security challenges in maintaining order on a day-to-day basis. Consequently, "[t]he difficulties of operating a detention center must not be underestimated by the courts. * * * The largest facilities process hundreds of people every day; smaller jails may be crowded on weekend nights, after a large police operation, or because of detainees arriving from other jurisdictions." *Florence*, 132 S. Ct. at 1515. In such an environment, hindsight analyses as to whether attempts to maintain order involved "excessive" force—in the absence of examining the subjective intent of the officers involved in the incident—invite a level of second-guessing and Monday-morning quarterbacking that would undermine officers' ability to decisively handle volatile situations.

Recognizing these challenges, this Court has consistently deferred to the sound judgment of correctional institutions and their officers. "Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face." *Ibid.* And because "problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions[,] [p]rison administrators * * * should be accorded wide-ranging deference in the adoption and ex-

ecution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547.

Such deference is especially warranted in the context of the excessive-force claims at issue here, because correctional institutions necessarily involve a heightened level of tension between those who are detained and those who are charged with maintaining order. Even before conviction, pre-trial detainees forfeit many of their constitutional freedoms—they cannot leave freely and must submit to the rules and regulations of the jail facility. Indeed, although these individuals have not been convicted and therefore cannot be punished for any crime, they still must abide by the same rules as any other inmate, and every aspect of their day-to-day activities is carefully monitored.

This dynamic creates a constant and inescapable friction between jail officers and inmates, as well as fertile soil for disputes. Indeed, when force becomes necessary to control a situation, both pre-trial detainees and post-conviction detainees have plenty of spare time to contemplate and pursue excessive-force claims. Unsurprisingly, excessive-force claims are more common in correctional institutions than in normal police activity. Cf. Eith & Durose, Bureau of Justice Statistics, U.S. Dep't of Justice, *Contacts between Police and the Public, 2008* 19 (rev. Oct. 5, 2011) (about 1.5% of general public reported contact with police involving force or the threat of force, whereas about 22% of inmates reported force or the threat of force during their arrest). And although local governments vary greatly in their potential exposure to and handling of such claims, they generally must allocate significant funds for insurance against and/or litigation costs related to such claims. The drain on local coffers may be even more pronounced in the context of jail-generated litigation, where the transient and often vio-

lent nature of the population may contribute to increased friction. See, *e.g.*, Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. at 1689 ("[I]t seems very likely that jail damage actions generally pose a larger risk of liability—and of high damages—than prison cases do, and experienced participants in the litigation system think that this is in fact the situation.").

B. The Eighth Amendment standard protects both officers and inmates, whereas the Fourth Amendment standard does not

Both officers and inmates are entitled to protection from the dangers inherent in jails. Everyone's security depends on the ability of officers to maintain order and decisively quell situations before they spiral into violence. If the Court sets an improper standard for excessive-force claims, the threat of burdensome and costly litigation brought by highly motivated inmates may cause governments and officers to withhold actions that must be taken to maintain order and promote safety. As Respondents explain, the Fourth Amendment standard not only provides lesser protection for officers on its face, but it also waters down the protection afforded by qualified immunity because courts struggle with the apparent paradox of an officer being "reasonably unreasonable." See Resp. Br. 39-40. Only the Eighth Amendment standard provides the requisite protection for officer discretion, while also ensuring that inmates are not punished without due process.

In the experience of *amici*, the greatest threat to inmate safety is not rogue guards meting out unjustified force, but rather fellow inmates who target particular individuals or groups, or even incite riots that put the entire jail population at risk. See, *e.g.*, Speigel, *Prison "Race Riots": An Easy Case for Segregation?*, 95 Cal. L. Rev. 2261 (2007) (discussing the roles of race and gangs in jail and prison violence). In New York City jails, for

example, inmates cause 40% of the injuries to other inmates, whereas the use of force by guards accounts for only 12% of inmate injuries. Ludwig et al., *Injury Surveillance in New York City Jails*, 102 American Journal of Public Health 1108, 1110 tbl.2 (2012). And where "rogue" guards are found, their behavior not only will typically violate internal regulations and state law but also will be punished equally under both the purely objective Fourth Amendment standard and the Eighth Amendment standard, which would take into account their nefarious motives. In either case, the inmates would be protected.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct.[1] NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 direct members in 28 countries, and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. In many such cases, as in this one, NACDL has sought to ensure that criminal defendants are not subject to excessive force during pretrial detention.

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[1] Each party has consented to the filing of *amicus curiae* briefs in support of either party or of neither party. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Summary Of Argument

The Seventh Circuit erred in its conclusion that excessive force claims by pretrial detainees cannot succeed unless the plaintiff demonstrates that the officers *both* used objectively unreasonable force *and* subjectively acted with reckless disregard of the plaintiff's safety. The subjective intent requirement is unnecessary; the proper—and only—requirement should be an objective assessment of whether the officers' actions were reasonable.

Since our nation's earliest days, courts have relied on the objective reasonableness test as a fair method of determining whether law enforcement and other officials have violated an individual's civil liberties in a wide range of circumstances, including in many types of excessive force cases. This *amicus* brief summarizes the history of the objective reasonableness test, as well as the reasons that courts have adopted it for more than a century in a variety of contexts. Neither the Seventh Circuit nor the respondents have set forth a persuasive basis for deviating from this test in cases involving pretrial detainees. Accordingly, the Seventh Circuit's decision should be reversed.

Argument

I. The Court Has Assessed the Objective Reasonableness of Alleged Civil Liberties Deprivations by Law Enforcement Personnel for More than a Century.

In holding that the jury correctly required Mr. Kingsley to demonstrate *both* objective unreasonableness *and* the officers' subjective intent, the Seventh Circuit ignored more than a century of precedent in which this Court has applied the objective reasonableness test to a wide range of claims against law enforcement and other officials.

The objective reasonableness test has been a cornerstone of Fourth Amendment jurisprudence since our nation's earliest days. Even before the Court used the term "objective reasonableness," it recognized the need to evaluate the government's actions from the perspective of a neutral, third-party observer. In *Locke v. United States*, 11 U.S. (7 Cranch) 339 (1813), the claimant challenged the federal government's condemnation of goods for violations of import laws, arguing that the government lacked probable cause for the goods' seizure. In addressing the argument, Chief Justice Marshall observed that probable cause "means less than evidence which would justify condemnation." *Id.* at 348. Probable cause, he wrote, "imports a seizure made under circumstances which warrant suspicion." *Id.* In other words, probable cause requires an *objective* analysis

of the circumstances, rather than an inquiry into the government's state of mind.

Subsequent precedents developed and honed this objective test. In *Stacey v. Emery*, 97 U.S. 642 (1878), the Court considered the plaintiff's claim that internal revenue agents violated his Fourth Amendment rights by seizing his whiskey. The plaintiff alleged that the seizure was wrongful and malicious. The Court refused to consider such factors, reasoning that

> [t]he question of malice or of good faith is not an element in the case. It is not a question of motive. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient. Whether the officer seized the occasion to do an act which would injure another, or whether he moved reluctantly, is quite immaterial.

Id. at 645. Indeed, the statute in *Stacey* used the term "reasonable cause of seizure," and the Court reasoned that there is not a "substantial difference" in the meaning of the terms "reasonable cause" and "probable cause." "If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause. In many of these reported cases the two expressions are used as meaning the same thing[.]" *Id.* at 646.

Similarly, the Court has held that objective reasonableness is the standard for false imprisonment claims, applying an understanding of the term "probable cause," albeit not in connection with a constitutional civil rights lawsuit. In *Director General of Railroads v. Kastenbaum*, 263 U.S. 25 (1923), the plaintiff claimed that an officer illegally detained him in connection with an investigation into theft of a rail car. The Court rejected the government's argument that the court should consider the intent of the officer. "The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did," Chief Justice Taft wrote, citing *Holmes on the Common Law*. *Id.* at 28. The Court noted that the want of probable cause "is measured by the state of the defendant's knowledge, not by his intent." *Id.* at 27-28; *see also id.* at 28 ("But the standard applied to defendant's consciousness is external to it.").

Building on Chief Justice Taft's reasoning, the Court has long recognized the dangers of focusing on the subjective intent of officers. In *Beck v. Ohio*, 379 U.S. 89 (1964), the Court considered the defendant's motion to suppress evidence gathered during his arrest, which he claimed lacked probable cause. The Court reversed the Ohio Supreme Court's affirmance of his conviction, reasoning that even if the police arrested the defendant in good faith, that is "not enough." *Id.* at 97 (citation and internal quotation marks omitted). Justice Stewart wrote that "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, pa-

pers, and effects,' only in the discretion of the police." *Id.*

Similarly, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court explained why the objective reasonableness test is the *only* framework in which to evaluate a Fourth Amendment claim arising from a stop-and-frisk. The Court concluded that the Fourth Amendment "becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Id.* at 21. Applying a different standard, the Court reasoned, "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22.

The objective reasonableness test, in fact, often protects the *government's* interests. Even if an officer's motive for a search or other intrusion is in bad faith, the officer will not face liability if the actions were objectively reasonable. *See United States v. Leon*, 468 U.S. 897, 918-19 (1984) ("[E]ven assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity"); *see also* Wayne R. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment* § 1.04(d) (4th ed. 2004).

The Court has long considered the objective reasonableness test to be the most effective analytical framework for deterring improper actions by law enforcement at the search and arrest stages. As Justice White explained in *Illinois v. Gates*, "[g]rounding the modification in objective reasonableness . . . retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." 462 U.S. 213, 261, n.15 (1983) (White, J., concurring in judgment).

II. The Court Has Applied the Objective Reasonableness Test to Excessive Force Cases.

The Seventh Circuit's imposition of a subjective intent requirement also conflicts with this Court's excessive force jurisprudence, which has historically analyzed the conduct of law enforcement personnel in relation to arrestees in objective terms.

In *Rochin v. California*, 342 U.S. 165 (1952), overruled on other grounds by *Mapp v. Ohio*, 367 U.S. 643 (1961), recognized by many commentators as this Court's first excessive force case,[2] police offic-

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[2] *See, e.g.*, Irene M. Baker, *Wilson v. Spain: Will Pre-trial Detainees Escape the Constitutional 'Twilight Zone'?*, 75 St. John's L. Rev. 449 (2001); Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 Alb. L. Rev. 173 (1987); Irene Prior Loftus, *Note, The "Reasonable" Approach to Excessive Force Cases Under Section 1983*, 64 Notre Dame L. Rev. 136, 140-47 (1989).

ers transported an arrestee to a medical facility and forcibly administered an emetic solution to compel the arrestee to vomit drugs that he had allegedly swallowed. *Id.* at 166. This Court held that such behavior violated the guarantees of Due Process under the Fourteenth Amendment, which embodied "those canons of decency and fairness" and "standards of conduct" that comprise American criminal justice. *Id.* at 169, 173.

The first explicit application of the objective reasonableness test to excessive force claims occurred in *Tennessee v. Garner*, 471 U.S. 1 (1985), which involved a 42 U.S.C. § 1983 claim asserted on behalf of a fleeing suspect shot to death by police officers. Applying an objective reasonableness test to the use of lethal force by an arresting officer, this Court reasoned that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 7. This requirement, as articulated, discounts the subjective mindset of law enforcement entirely. *See id.* at 11 ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.").

This Court subsequently affirmed the application of the objective reasonableness test to excessive force claims in *Graham v. Connor*, 490 U.S. 386 (1989), noting that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, *or other 'seizure'* of a free citizen should be analyzed under

the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395 (emphasis added). In doing so, this Court notably rejected the subjective four-part test for excessive force claims advanced by lower courts prior to its decision, *see, e.g.*, *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), which assessed, *inter alia*, "whether force was applied in a good faith effort." *Id.* at 1033. "As in other Fourth Amendment contexts," the Court emphasized, "the 'reasonableness' inquiry in an excessive force case is an objective one." *Graham*, 490 U.S. at 397.

On multiple occasions since, this Court has reaffirmed that *Graham* "clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *abrogated on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009); *see also Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) ("A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard."); *Scott v. Harris*, 550 U.S. 372, 381 (2007) ("[A] claim of excessive force in the course of making a seizure of the person is properly analyzed under the Fourth Amendment's 'objective reasonableness' standard.") (internal quotations omitted); *Muehler v. Mena*, 544 U.S. 93, 98–99 (2005) ("Inherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention."); *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) ("These cases establish that claims of excessive force are to be judged under the

Fourth Amendment's 'objective reasonableness' standard.").

III. The Court's Reasoning in Support of the Objective Reasonableness Test is Equally Applicable to Cases Involving Pretrial Detainees.

The Seventh Circuit's decision to require Mr. Kingsley to make a showing of subjective intent as an element of his excessive force claim is particularly inappropriate for pre-trial detainees.

While this Court has embraced a subjective inquiry in adjudicating excessive force claims under the Eighth Amendment, *see Whitley v. Albers*, 475 U.S. 312, 318-26 (1986), the Court has applied this test only to convicted prisoners—not to pretrial detainees who have yet to be found guilty. In the post-conviction context of the Eighth Amendment, the question of whether a state actor has committed an "unnecessary and wanton infliction of pain" necessarily and appropriately contemplates scienter. *See id.* at 319. But the Seventh Circuit erred by imposing a subjective intent requirement to claims arising from excessive force that occurs *before* conviction.

The objective reasonableness test applies not only at the time of arrest or criminal investigation, *see Graham*, 490 U.S. at 394-96, but also to Mr. Kingsley inasmuch as pre-trial detainment triggers the protection of the Fourth Amendment and its correlative "objective reasonableness" test. As Justice Ginsburg has observed, any criminal detention or restraint on freedom prior to an adjudication of guilt constitutes a

"seizure" under the Fourth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 276–78 (1994) (Ginsburg, J., concurring) (citing 2 M. Hale, Pleas of the Crown at 124; 4 W. Blackstone, Commentaries for proposition that bailees are still in custody and thus "seized").

While the Fourth Amendment arguably applies, this Court has stated that the Due Process Clause of the Fourteenth Amendment, at a minimum, protects pre-trial detainees from excessive force as an unconstitutional "punishment." *See Bell v. Wolfish*, 441 U.S. 520 (1979); *Graham*, 490 U.S. at 395 n.10. Accordingly, even if this Court determines that pre-trial detention marks the "point at which Fourth Amendment protections end and Fourteenth Amendment protections begin," *Orem v. Rephann*, 523 F.3d 442, 446 (4th Cir. 2008), the objective reasonableness standard should nonetheless govern all excessive force claims of pre-trial detainees, *see Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175 (9th Cir. 2002) (applying Fourth Amendment test); *accord Andrews v. Neer*, 253 F.3d 1052 (8th Cir. 2001).

Bell v. Wolfish, 441 U.S. 520 (1979), established that the Due Process Clause prohibits excessive force as an unconstitutional "punishment" under the Fourteenth Amendment. While the test outlined by *Bell* examines, *inter alia*, an "*expressed* intent to punish," this question and the test *in toto* constitute an objective inquiry: "A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538. Although the lower courts are in conflict, cases properly applying

Bell to pretrial detainees have treated its inquiry as an objective test. *See United States v. Budd*, 496 F.3d 517 (6th Cir. 2007); *Fuentes v. Wagner*, 206 F.3d 335 (3d Cir. 2000).

In fact, outside of the excessive force context, the inquiry into whether state action constitutes "punishment" under the Fourteenth Amendment has been an objective one. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-167 (1963) (automatic forfeiture-of-citizenship after arrest for draft evasion constituted impermissible punishment); *Flemming v. Nestor*, 363 U.S. 603 (1960) (termination of social security benefits for deportee accused of communist membership); *De Veau v. Braisted*, 363 U.S. 144 (1960) (Bill of Attainder and Ex Post Facto laws).

Neither the Seventh Circuit nor respondents have set forth any persuasive arguments as to why pretrial detainees should face a higher standard of proof in excessive force claims. Accordingly, even if the Due Process Clause of the Fourteenth Amendment governs pretrial detainee excessive force claims, the test is and ought to be an objective one.

Conclusion

The Seventh Circuit's judgment should be reversed.

Respectfully submitted,

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MICHAEL B. KINGSLEY, PETITIONER

v.

STAN HENDRICKSON AND FRITZ DEGNER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL SHERIFFS' ASSOCIATION ET AL. AS AMICI CURIAE

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AMICI CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION, ET AL.

The National Sheriffs' Association, et al., respectfully submit this *amici curiae* brief. Pursuant to Supreme Court Rule 37.3(a), counsel of record have received timely notice of the intent to file this brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Sheriffs' Association (the "NSA") is a non-profit association formed under 26 U.S.C. 501(c)(4). Formed in 1940 the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.

Amici represent the nation's sheriffs who operate more than 3,000 local correctional facilities throughout the country. The vast majority of these facilities house both pretrial detainees and convicted inmates.[1] Sheriffs, as the custodians of the inmates housed within these facilities, are charged with

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[1] For the purposes of this brief unless noted otherwise, pretrial detainees include any inmate, including arrestees, who have not been convicted.

providing a safe and secure environment for both the inmates and for their staff.

In this case under review, the Seventh Circuit affirmed the district court's judgment dismissing petitioner's action under 42 U.S.C. 1983, which alleged that the respondent county jail officials had employed excessive force in transferring him to a cell within the facility. In reviewing this case and rendering its decision, *amici* respectfully ask this Court to apply the same Constitutional standard concerning use of force by correctional staff on incarcerated persons regardless of whether they are pretrial detainees or convicted inmates.

SUMMARY OF ARGUMENT

Jails in the United States house a mixture of both pretrial and convicted inmates. The housing and classification of inmates in a jail are not based on their pretrial versus convicted status but rather on a behavioral and security based classification system utilizing a multitude of factors. As such, pretrial and convicted inmates are housed together.

This Court has already held, in *Whitley v. Albers*, 475 U.S. 312 (1985), that force used as part of a good-faith effort to restore prison security does not violate an inmate's Eighth Amendment rights. Further, in *Hudson v. McMillian*, 503 U.S. 1 (1991), this Court expanded on *Whitley* to hold that correctional deputies inflict cruel and unusual punishment under the Eighth Amendment if they use force maliciously and sadistically to cause harm rather than in a good-faith effort to maintain or restore discipline. What has not been established by this Court is whether this same standard applies to pretrial inmates.

Pretrial and convicted inmates are housed together in jails, sometimes in the same cell. Both types of inmates may be involved in a single incident that may require correctional deputies to use force to enforce the safety and security procedures of a jail. Accordingly, there should be one universal standard regarding the use of force in a custodial setting regardless of an inmate's status as pretrial or convicted. Pretrial and convicted inmates are required to abide by the same rules of behavior. To treat various classes of inmates differently as to the amount of force needed to enforce jail safety procedures is counterproductive to the overall safety of all inmates and staff. Further, given that both pretrial and convicted inmates are housed together based upon numerous classification criteria, as a practical matter, it would be impossible for deputies responding to an incident in a housing module to distinguish between inmates in order to maintain or restore order.

As amici curiae, the National Sheriffs' Association respectfully suggests that it is time for this Court to end any ambiguity concerning the standard for the use of force by custodial staff in maintaining safety, security, order, control and discipline in a correctional facility. The Sheriffs of the United States submit there is one universal standard regarding the use of force on inmates, and it is the one articulated by this Court in *Whitley v. Albers* and *Hudson v. McMillian*. The Court's decision in this case should emphasize that the same standard applies to both pretrial detainees and convicted inmates.

ARGUMENT

I. There Should Be One Constitutional Standard for the Application of Force in a Correctional Facility, and That Standard Is the One Articulated in *Whitley v. Albers* and *Hudson v. McMillian*.

A. Jails Hold Both Pretrial and Convicted Inmates

Sheriffs' Offices throughout the country maintain jails for the purpose of detaining adults who are either charged with criminal law violations and are awaiting trial or who are sentenced adult criminal offenders. In 2013, local jails housed approximately 731,200 incarcerated individuals.[2] Of the 731,200 inmates held in local jails, 38% of them were convicted inmates, while 62% were pretrial detainees.[3]

Many of the concerns relating to jail violations or "in custody" behavior are not distinguishable based upon an inmate's conviction status. Physical assaults, drug violations, alcohol violations, possession of weapons, possession of stolen property, escape attempts, and other major violations are committed by both pretrial detainees and sentenced inmates.

Additionally, the nature of criminal offenses and criminal sophistication do not change based upon the

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[2] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Correctional Populations in the United States, 2013, NCJ 248479 (Dec. 2014), http://www.bjs.gov/content/pub/pdf/cpus13.pdf.

[3] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Jail Inmates at Midyear 2013-Statistical Tables, NCJ 245350 (May 2014), http://www.bjs.gov/content/pub/pdf/jim13st.pdf.

conviction status of inmates in the jails. Indeed, this Court has recognized that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals." *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S.Ct. 1510, 1520 (2012).

Jails house a variety of inmates. Among them are pretrial detainees accused of nonviolent crimes ranging from theft offenses to drug offenses and violent crimes including rape, assault, manslaughter, and murder. Additionally, jails can house convicted inmates sentenced for some of those very same offenses. In some states convicted inmates can be sentenced to serve their confinement in a county jail for periods exceeding one year.[4] Pretrial inmates can also be detained for periods exceeding one year in a county jail while waiting for their cases to be adjudicated.[5] Finally, inmates who are convicted of more serious offenses and who are sentenced to state prison are often returned to county jails and commingled with pretrial detainees while waiting to be transferred to state prison.

Jails hold both pretrial detainees charged with crimes and inmates convicted of the very same criminal

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[4] According to a survey conducted by the California State Sheriffs' Association, as of April 25, 2014, there were 1635 county jail inmates sentenced to between 5 and 10 years and 124 inmates sentenced to over 10 years in county jail in California. California State Sheriffs' Association, *Updated Survey of Long Term Offenders in County Jails*, (2014), http://www.calsheriffs.org

[5] See *United States v. Briggs* 697 F.3D 98 (2d Cir. 2012) upholding the pretrial detention of a defendant for over 26 months, and *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000), *cert. denied*, 531 U.S. 801 (2000) upholding a projected pretrial detention of between 30 and 33 months.

offenses. Sheriffs' deputies cannot reasonably be expected to distinguish among inmates based solely upon their conviction status when attempting to maintain or restore order in a jail facility.

B. Jail Inmates Are Not Housed Based On Their Conviction Status

There is no doubt that a long-established body of Constitutional law, utilizing the "deliberate indifference" standard, obligates a correctional facility to take reasonable measures to provide for the safety of inmates. Those measures include steps to reduce the risk of harm from other inmates. *Farmer v. Brennan*, 511 U.S. 825 (1994). In addition to enforcing rules of behavior, some of which on occasion require the use of force, a major tool used by corrections administrators to accomplish their mission is a comprehensive system of inmate classification. The purpose of inmate classification is to ensure that housing protects the vulnerable from the predatory, the weak from the strong and the potential perpetrator from the potential victim[6].

The conviction status of an inmate within a correctional setting is relevant only as one of many objective classification factors used to help jail administrators provide a safe and secure facility. Objective classification factors also include, but are not limited to, criminal sophistication, seriousness of offense, medical or mental health needs, "in custody" behavior, and security risk. Relying solely on an inmate's conviction status to determine housing for an

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[6] James Austin, *Objective Jail Classification Systems: A Guide for Jail Administrators*, (February 1998), p. 1, 8.

inmate could, in and of itself, represent a constitutional violation and clearly is inconsistent with modern professional standards. The use of an objective classification system helps improve the level of safety for inmates and staff. Failure to employ such a classification system has resulted in liability both under 42 U.S.C. §1983 and state law. See, *Jensen v. Clarke*, 94 F. 3d 1191 (8th Cir. 1996); *McCray v. Sullivan*, 509 F.2d 1332, 1334 (5th Cir. 1975).

In a modern facility, staff interaction with inmates, as both a practical and legal matter, generally does not differ based upon an inmate's conviction status. Inmates, regardless of conviction status, are expected to follow all rules of behavior. It seems that only in the area of use of force, as it relates to inmates, is there left a question as to whether conviction status requires differing treatment among similarly confined inmates. The National Sheriffs' Association believes that conviction status does not require different standards for use of force, and it is for this very reason that the Association submits this brief.

C. There Is No Constitutional Basis For A Distinction Between Pretrial and Convicted Inmates

Decisions of this Court regarding convicted inmates' Constitutional rights have long been applied to pretrial detainees. In the seminal case of *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court recognized that "simply because prison inmates retain certain Constitutional rights does not mean that these rights are not subject to restrictions and limitations." This Court went on to hold that this principle applies equally

to pretrial detainees and convicted prisoners. *Id.* at 546.

In *Turner v. Safley*, 482 U.S. 78 (1987) this Court examined the constitutionality of regulations affecting inmate correspondence and inmate marriages under the First Amendment. In so doing this Court made no distinction between pretrial detainees and convicted inmates. *Turner* is heralded as the leading Supreme Court decision in the area of correctional law and is universally applied to both pretrial and convicted inmates.

In *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) this Court examined whether an inmate's Eighth Amendment rights were violated for failure of the correctional facility to provide adequate medical care. *Estelle* is the foundation for the legal analysis regarding medical care and is universally applied to both pretrial and convicted inmates.

In *Wilson v. Seiter*, 501 U.S. 294 (1991), an inmate filed an action against prison officials under 42 U.S.C.S. § 1983. The inmate alleged that a number of the conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In examining the issue, this Court stated that "[W]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*." *Id.* at 303. *Wilson* is universally applied to both pretrial and convicted inmates as it relates to conditions of confinement cases.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), this Court held that a prison official may be held liable under the Eighth Amendment for acting with

"deliberate indifference" to inmate health or safety only if the official knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Farmer* is the foundational precedent applied without distinction to the inmate's convicted status regarding the duty to protect as well as other claims alleging violations of the Eighth Amendment. No distinction was made between pretrial detainees and convicted inmates.

In *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) this Court examined the religious rights of "current and former inmates" of institutions operated by the Ohio Department of Rehabilitation and Correction under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §2000cc (2000), *et seq.*, without making a distinction between pretrial detainees and convicted inmates. *Cutter*, 544 U.S. at 723. RLUIPA's arms extend to *all* institutionalized persons, focusing on those incarcerated in jails and prisons. This Court unanimously held that RLUIPA was constitutionally enacted.

In *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S. Ct. 1510 (2012), this Court examined pretrial detainees' Fourth and Fourteenth Amendment rights against strip searches noting that:

> Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies. Facility personnel, other inmates, and the new detainee himself or herself may be in danger if these threats are introduced into the jail population. This case presents the question of what rules, or

> limitations, the Constitution imposes on searches of arrested persons who are to be held in jail while their cases are being processed. The term "jail" is used here in a broad sense to include prisons and other detention facilities.

Florence, 132 S. Ct. at 1513.

This Court also noted the extent of jail populations and the difficulties inherent in jails, as opposed to prisons, as follows:

> The difficulties of operating a detention center must not be underestimated by the courts. *Turner v. Safley*, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Jails (in the stricter sense of the term, excluding prison facilities) admit more than 13 million inmates a year. See, *e.g.*, Dept. of Justice, Bureau of Justice Statistics, T. Minton, Jail Inmates at Midyear 2010--Statistical Tables 2 (2011). The largest facilities process hundreds of people every day; smaller jails may be crowded on weekend nights, after a large police operation, or because of detainees arriving from other jurisdictions. [1] Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face. The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld "if it is reasonably related to legitimate penological interests." *Turner, supra*, at 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64; see [1516] *Overton v. Bazzetta*,

> 539 U.S. 126, 131-132, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). But see *Johnson* v. *California*, 543 U.S. 499, 510-511, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) (applying strict scrutiny to racial classifications).
>
> ...
>
> *Bell*, 441 U.S., at 546, 99 S. Ct. 1861, 60 L. Ed. 2d 447 ("[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of retained constitutional rights of both convicted prisoners and pretrial detainees").

Florence, 132 S. Ct. at 1515-1517.

As this Court recognized in *Bell*, an inmate's convicted status does not diminish the potential for contraband to be smuggled into the facility. In the *Florence* decision, this Court echoed *Bell* and affirmed *Turner* by holding that correctional officials have a legitimate governmental interest to maintain safety and security for all who live and work in these institutions. This Court has recognized that under the Fourth and Fourteenth Amendments even arrestees are treated the same as pretrial detainees and convicted inmates for the purpose of strip searches when entering general population. *Florence*, 132 S. Ct. at 1523.

In *Holt v. Hobbs*, 135 S. Ct. 853 (2015) this Court held a Department's policy violated RLUIPA, which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an "institutionalized person," unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling

governmental interest. This Court did so without making a distinction between pretrial and convicted inmates.

In sum, this Court does not distinguish between pretrial and convicted inmates in examining claims of Constitutional violations relating to conditions of confinement (*Bell*), involving rights of freedom of speech and marriage of inmates (*Turner*), inadequate medical care of inmates (*Estelle*), conditions of confinement (*Wilson*), duty to protect inmates (*Farmer*), freedom of religion of inmates (*Cutter* and *Holt*), or strip searches of inmates (*Florence*). Accordingly, no such distinction should be made regarding claims of excessive use of force by staff in correctional facilities.

D. There Should Be One Universal Constitutional Standard Regarding the Use of Force On Inmates

Use of force scenarios are fluid, ever evolving and changing. A deputy in the jail does not have the ability to determine during an incident whether the Fourth, Eighth, or Fourteenth Amendment applies to a particular inmate. What they do have, is the ability to ascertain the threat they perceive by the inmate and information available to them, the need for force at that given moment, the amount of force they will choose in relation to the need for the use of force, and if an option, any efforts made to de-escalate the situation. It would be unrealistic to inflict upon deputies a different use of force standard depending on the status of the inmate. There should be but one standard applied to the use of force in a correctional setting. The standard previously articulated by this Court in *Whitley v. Albers* and

Hudson v. McMillian is the correct standard.

The reality of jail management is that confining inmates in close proximity with one another has the obvious potential for violence. Responding to violence as a general rule requires the use of some level of force and restraint measures by staff. Depending upon the perceived threat, the response may range from simply coercing inmates to comply with orders to using deadly force. Such risks are a natural result of having to supervise, control, and manage both pretrial and convicted inmates who are involuntarily incarcerated. Deputies must protect themselves and others, but always with the concern that their protective actions will be evaluated after the fact by persons who have never had to risk personal injury to restore or maintain order in a jail.

Deputies must control inmates and manage the jail regardless of the inmate's status. When inmates act out in ways that upset order and discipline they must be controlled and order restored. It is not an option for a deputy to ignore or fail to act when such actions occur. Restoring and maintaining order in the jail is the duty of all detention staff regardless of the inmate's status. Detention staff who work in jails are at constant risk of harm in dealing with inmates regardless of their conviction status. Deputies cannot determine solely by looking at an inmate which one is more likely to engage in an unprovoked assault on staff. Nor can a deputy determine during a facility disturbance which inmates are more likely to resist efforts to restore or maintain order. Detention deputies have a legitimate interest in maintaining safety, security, order, control, and discipline. As a result they must act to restore order when inmates become destructive, threatening, aggressive, or

engaged in actions that could result in self-inflicted injury, regardless of the inmate's conviction status. [7]

The foundation of all legal analysis regarding use of force begins and ends with this Court's two leading decisions regarding force in custodial settings, *Whitely v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. 1 (1992).

Whitely set the standard for use of force scenarios in which force is applied during "exigent circumstances", or decisions made in haste, under pressure, or without the luxury of a second chance. In those circumstances this Court departed from its previous standard of deliberate indifference (criminal recklessness), and held that when evaluating use of force, the issue is *whether the force was applied in a good faith effort to maintain and restore discipline, or maliciously and sadistically for the very purpose of causing harm.*

In all other use of force scenarios, the standard articulated in *Hudson* applies.

In *Hudson*, this Court articulated a five-part test to be applied in use of force decisions regarding inmates. The *Hudson* factors provide an excellent framework by which to develop written policies and procedures, reporting and review instruments, as well as staff training. This Court's decision appeared to recognize the very substantial differences between needs and requirements for the use of force *outside corrections facilities* and use of force *inside jails and prisons*. Jails and prisons confine in close proximity

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[7] The Amici adamantly oppose force as punishment, as was articulated in *Whitley v. Albers*. We continue to strongly endorse that constitutional view.

large numbers of inmates, *both pretrial and convicted together*, many of whom have some violence in their criminal histories and who may act violently without provocation or warning.

The five factors of *Hudson* become relevant in determining whether force was applied in a good faith effort to maintain and restore order or was malicious and sadistic for the very purpose of causing harm. The appropriate factors for determining the reasonableness of force are:

1. The threat(s) to safety, security, order, control, and/or discipline perceived by the responsible detention deputy;
2. Whether in light of the perceived threat(s), the responsible detention deputy believed force was necessary to resolve the threat(s);
3. The amount or severity of force used by the responsible detention deputy in relation to the need for force;
4. What efforts were made by the responsible detention deputy to temper the forceful response; and
5. The extent of the injury, if any, suffered by the inmate.[8]

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[8] This court affirmed the continued viability of *Hudson v. McMillian* in *Wilkins v. Gaddy*,*559 U.S. 34* (2010) reiterating that the extent of the injury is only one of the factors to be considered in determining if the force applied was malicious and sadistic for the very purpose of causing harm, or whether the force applied was "reasonable" [T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary" in a particular situation, "or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Hudson*.

As to convicted inmates *Whitley* and *Hudson* are indisputably recognized as the controlling precedent.

E. ***Whitley* and *Hudson* Have Been Applied To Pretrial Detainees**

As to pretrial detainees *Whitley* and *Hudson* are recognized in multiple circuits as also providing the controlling precedent. See *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000), ("the Eighth Amendment cruel and unusual punishments standards found in *Whitley v. Albers*, and *Hudson v. McMillian*, citations omitted, apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance."); *Scarbro v. New Hanover County*, 374 Fed. Appx. 366, 369-370 (4th Cir. 2010), (pretrial detainees are held to the same burden of proof for excessive force claims as convicted inmates); *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993)(for "excessive use of force claims by pretrial detainees...we are guided by the standard announced in *Whitley* and *Hudson*"); *Kitchen v. Dallas County*, 759 F.3d 468, 477 (5th Cir. 2014)"; *Forrest v. Prine*, 620 F.3d 739, 744 (7th Cir. 2010)(applying the Eighth Amendment standards to evaluate a use of force claim by a pretrial detainee.); *Redman v. County of San Diego*, 942 F.2d 1435, 1442 (9th Cir. 1991), *cert. den.*, 502 U.S. 1074 (1992)(citing *Whitley* and finding that it is not "inappropriate that the same standard may be used under the Fourteenth and Eighth Amendment."; *Walton v. Gomez*, 745 F.3d 405,426 (10th Cir. 2014)(applying the *Whitley* and *Hudson* factors in examining a use of force claim by a pretrial detainee. including the motives of the state actor.); *Bozeman v. Orum*, 422 F.3d 1265 (11th Cir. 2005)("whether or not a

prison guard's application of force is actionable turns on whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.").

These circuits have wisely recognized and applied this constitutional standard to all inmates within the correctional setting regardless of an inmate's status. This exceptional working standard requires a deputy to perceive a threat by an inmate, determine whether force is needed and, if force is needed, apply the necessary amount to maintain or restore order. This Court has long applied its decisions regarding convicted inmates to pretrial detainees. The jails in the United States house both pretrial and convicted inmates together. To have a different standard for pretrial detainees in the jails is unrealistic and unmanageable.

CONCLUSION

For these reasons, the National Sheriffs' Association urges this Court to end any ambiguity and clearly state that there is but one Constitutional standard to be applied to the use of force on both pretrial detainees and convicted inmates in any correctional setting. That standard is the one previously articulated by this Court in *Whitely v. Albers* and *Hudson v. McMillian*.

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MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON
AND
FRITZ DEGNER,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because it is greatly concerned about and seeks to defend the safety and security of the most vulnerable among us from abuses of power at the hands of the government. Pretrial detainees are particularly vulnerable to abuse because they are held beyond the view of the public; those charged with their detention and custody are not subject to the moderating influence of public scrutiny and inspection. The legal remedies available to pretrial detainees must not be unduly restrictive if their right not to suffer needless abuse is to be assured. The Rutherford Institute submits this brief in the hopes that the law will provide true protection for the security of pretrial detainees.

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[1] This amicus brief is filed with the parties' consent. Petitioner filed a letter granting consent to *amicus curiae* briefs in support of either or neither party on February 10, 2015, and Respondents filed a similar letter of consent on February 19, 2015. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

SUMMARY OF ARGUMENT

"At common law pretrial detainees were differentiated from sentenced prisoners." *Feeley v. Sampson*, 570 F.2d 364, 368 (1st Cir. 1978). As the Circuits often have noted,[2] the issue before this Court was addressed more than 245 years ago by Blackstone in his *Commentaries* where he agreed that pretrial detainees are entitled as a matter of simple justice to better treatment than that given convicted criminals.

> [I]f the offense be not bailable, or the party cannot find bail, he is to be committed to the county [jail] ... But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only....

4 W. Blackstone, *Commentaries* *300. This "elegant statement"[3] holds as true today as it did then, and should guide the outcome of this case.

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[2] *See, e.g.*, *Campbell v. McGruder*, 580 F.2d 521, 527-28 (D.C.Cir. 1978); *Halvorsen v. Baird*, 146 F.3d 680, 689 (9th Cir. 1998).

[3] *Rhem v. Malcolm*, 507 F.2d 333, 342 (2d Cir. 1974).

Consistent with this Court's precedent, several Circuits continue to apply this common law principle in our constitutional age, holding that the use of objectively unreasonable force against pretrial detainees runs afoul of the Fourteenth Amendment and is the modern day constitutional equivalent of the common law's needless fetters, unnecessary hardships, and lack of humanity. Under this standard, the lack of intent is irrelevant if the officer acts in an objectively unreasonable way. A pure heart cannot shield an empty head. Objective reasonableness is elastically measured, not in hindsight, but by the facts and circumstances confronting the officer at that time. And officials who fail to meet this standard towards pretrial detainees have imposed a form of "punishment" as forbidden at common law since the days of Blackstone and constitutionally since this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). The Seventh Circuit below followed a contrary standard which fails to accord proper protection to the liberty interests of pretrial detainees and should be reversed.

ARGUMENT

I. THE LIBERTY INTEREST TRADITIONALLY AFFORDED TO PRETRIAL DETAINEES REQUIRES APPLICATION OF AN OBJECTIVE STANDARD TO EXCESSIVE FORCE CLAIMS THEY ASSERT

A. This Court's Guideposts.

1. Arrestees - the Objective Fourth Amendment Standard. An excessive force claim brought by an otherwise free citizen arising during

the course of his arrest is analyzed under the familiar "objective reasonableness" standard of *Graham v. Connor*, 490 U.S. 386, 388 (1989). The question is whether the officer's actions are "'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. Subjective motivations have no bearing. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.*

2. Convicted Prisoners - the Subjective Eighth Amendment Standard. At the other end of the spectrum, excessive force claims brought by convicted prisoners are governed by the cruel and unusual punishment test of the Eighth Amendment, where the core inquiry is "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992); *see Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). Subjective intent is key. "[T]he subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment." *Graham*, 490 U.S. at 398.

3. Pretrial Detainees - the Fourteenth Amendment Standard. The decision in this case will establish standards to govern claims of excessive force for those citizens - pretrial detainees - who find themselves in this "dubious

interval"[4] between these two poles of the justice system. In *Graham*, this Court explained that "our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today." *Graham*, 490 U.S. at 395 n.10.[5] However, this Court did find it "clear that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Id.*

4. The Punishment Test. The limited extent of this Court's precedent addressing the due process rights of pretrial detainees is found in the earlier case of *Bell v. Wolfish*, 441 U.S. 520 (1979). There the Court explained that "[a] person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a judicial determination of probable cause as a prerequisite to the extended restraint of his liberty following arrest." *Id.* at 536 (internal punctuation omitted). Thus, because "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law," *id.* at 535; *see id.* at 535 n. 16 ("[d]ue process requires that a pretrial detainee not be punished."), "the proper inquiry is whether those conditions amounted to

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[4] 4 W. Blackstone, *Commentaries* *300.

[5] As the Brief of the Petitioner persuasively argues, the Fourth Amendment also should apply to applications of force against pretrial detainees because use of force is a wholly distinct seizure of the prisoner. Br. of Pet. at 27-34.

punishment of the detainee." *Id.* at 535. In other words, a "court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate government purpose." *Id.* at 538. The *Bell* Court continued and set forth a two-part analysis for determining whether punishment has occurred, explaining that -

> Absent a showing of an expressed intent to punish on the part of the detention facility officials, that determination will generally turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.

Id. at 538 (internal punctuation omitted) (emphasis added). Thus, punishment under *Bell* can be proven in any one of two ways:

1. Through evidence of an "expressed intent" to punish, *Bell*, 441 U.S. at 538, or

2. By analyzing whether the challenged action at issue is reasonably related to a legitimate government purpose and whether the action is excessive to achieving that purpose. *See id.* (this "determination will generally turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.") (emphasis added); *id.* at 539

> ("Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, without more, amount to 'punishment.'") (emphasis added); *id.* ("if a restriction or condition is not reasonably related to a legitimate goal - if it is arbitrary or purposeless - a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees qua detainees."). *Id.* (emphasis added).

So under *Bell*'s second prong, the analysis turns on how to determine the reasonableness of a challenged government action and whether that action is excessive.

B. The Circuit Court Approaches. Although a number of Circuits have recognized that *Bell* requires this two part analysis,[6] only some apply it.

1. Subjective Intent Required - The Eighth Amendment Standard. The Fifth and Third Circuits have taken the position that "[w]hile [the *Bell*] inquiry works well for claims of improper conditions or restrictions, it does not lend itself to analysis of claims of excessive use of force in

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[6] *See, e.g. Blackmon v. Sutton*, 734 F.3d 1237, 1241 (10th Cir. 2013); *Bistrian v. Levi*, 696 F.3d 352, 373 (3d Cir. 2012); *Baribeau v. City of Minneapolis*, 596 F.3d 465, 483 (8th Cir. 2010); *Slade v. Hampton Roads Regional Jail*, 407 F.3d 243, 251 (4th Cir. 2005); *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993).

controlling prison disturbances." *Valencia*, 981 F.2d at 1446; *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000).

Both of these Circuits have explicitly declined to apply the *Bell* test and instead apply the subjective Eighth Amendment *Hudson* excessive force standard for convicted prisoners.[7] They are joined by the Second,[8] Fourth[9] and Eleventh[10]

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[7] *See Valencia*, 981 F.2d at 1446 ("For these reasons, we conclude that excessive use of force claims by pretrial detainees should not be analyzed under Bell's conditions of confinement standard. Instead, we are guided by the standard announced in *Whitley* and *Hudson*"); *Fuentes*, 206 F.3d at 347-48 ("Accordingly, we hold that the Eighth Amendment cruel and unusual punishments standards found in [*Whitley* and *Hudson*] apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance") (emphasis removed).

[8] *See U.S. v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999) ("we conclude that the Hudson analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well").

[9] *See Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998) ("To succeed on a claim of excessive force under the Due Process Clause of the Fourteenth Amendment, Taylor must show that Defendants inflicted unnecessary and wanton pain and suffering.... The proper inquiry is whether the force applied was in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.") (internal punctuation omitted) (overruled on other grounds by *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam)).

Circuits in explicitly applying the Eighth Amendment standard.

Applying standards similar to that of the Eighth Amendment are the Sixth[11] and D.C.[12] Circuits, as well as the Seventh in the decision under review.[13]

But in many of these same Circuits, the case law itself is mixed on these issues. Significant parts of the majority and dissenting opinion below centered around the decision in *Titran v. Ackman*,

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[10] *See Fennell v. Gilstrap*, 559 F.3d 1212, 1216 n.5 (11th Cir. 2009) ("A claim of excessive force under the Fourteenth Amendment is analyzed as if it were an excessive force claim under the Eighth Amendment.").

[11] *See Shreve v. Franklin County, Ohio*, 743 F.3d 126, 134 (6th Cir. 2014) (applying a shocks the conscience standard); *Burgess v. Fischer*, 735 F.3d 462, 472-73 (6th Cir. 2013) ("shocks the conscience standard" and observing this is a "a substantially higher hurdle to overcome" than the Fourth Amendment objective reasonableness standard).

[12] *See Norris v. District of Columbia*, 737 F.2d 1148, 1152 n.8 (D.C. 1984) (the "Constitution may be offended if the force used grossly exceeds that warranted by the circumstances"); *id.* at 1150 (citing with favor a test which includes Eighth Amendment subjective intent analysis).

[13] *See Kingsley v. Hendrickson*, 744 F.3d 443, 453 (7th Cir. 2014) ("the existence of intent - at least recklessness - is a requirement in Fourteenth Amendment excessive force cases").

893 F.2d 145, 147 (7th Cir.1990), where the Seventh Circuit explained that "[m]ost of the time the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them," *id.* at 147, but then continued and conversely observed that "the search for 'punishment' cannot be wholly objective." *Id.* Similarly, in *U.S. v. Budd*, 496 F.3d 517, 530 (6th Cir. 2007), the Sixth Circuit analyzed a finding of excessive force by a prison guard against a pretrial detainee under the two part *Bell* standard, not the more restrictive subjective Eighth Amendment test.

The Seventh Circuit also has previously observed that the Fourteenth Amendment rights of pretrial detainees should be broader than those of convicted criminals under the Eighth Amendment. *See Forrest v. Prine*, 620 F.3d 739, 744 (7th Cir. 2010) ("The Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment"). The Sixth Circuit has made similar observations. *See Leary v. Livingston County*, 528 F.3d 438, 443 (6th Cir. 2008) ("there is room for debate over whether the Due Process Clause grants pretrial detainees more protections than the Eighth Amendment does.").

2. Subjective Intent Not Required. Three Circuits do not require a pretrial detainee to prove an officer's subjective intent to harm him.

a. Subjective Intent Irrelevant - the Fourth Amendment Standard. Both the Eighth[14] and Ninth Circuits[15] apply an objective reasonableness standard akin to that under the Fourth Amendment when evaluating excessive force claims of pretrial detainees.

b. Subjective Intent Can Be a Factor, but Is Not Required. The Tenth Circuit follows a unique approach in that although it does not require a finding of intent, it recognizes that intent can be a factor in a totality of the

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[14] *See Andrews v. Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) ("The evaluation of excessive force claims brought by pre trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard."); *Jackson v. Buckman*, 756 F.3d 1060, 1067 (8th Cir. 2014) ("The objective indicia relevant to the excessive force analysis under the Fourth Amendment guide this due process inquiry.") Notably, in *Jackson*, the 8th Circuit applied the second prong of the *Bell* analysis, finding that "[a]n official's use of force does not amount to punishment in the constitutional sense if it is but an incident of some other legitimate government purpose." *Jackson*, 756 F.3d at 1067.

[15] *See Gibson v. County of Washoe, Nev.*, 290 F.3d 1175 (9th Cir. 2002) ("the Fourth Amendment sets the applicable constitutional limitations for considering claims of excessive force during pretrial detention.") (internal punctuation omitted); *Hunter v. County of Sacramento*, 652 F.3d 1225, 1231 n.6 (9th Cir. 2011) ("*Graham*...explicates the standards applicable to a pre-trial detention excessive force claim in this circuit.").

circumstances analysis to determine excessive force.[16]

C. Elimination of a Subjective Intent Element is Consistent with *Bell*. Consistent with their treatment at common law and as a matter of constitutional law, the protections afforded pretrial detainees should be stronger than those afforded to convicted prisoners. As this Court observed in *Graham*, "the less protective Eighth Amendment standard applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Graham*, 490 U.S. at 398 (internal punctuation omitted). Yet pretrial detainees have not received the protections of these constitutional guarantees. They have not been convicted of any crime, they have not been judged by a jury of their peers, they have not faced their accuser, they have not yet been able to see the government's evidence against them, they have not yet had their day in court, and have not yet experienced the rest of the full panoply of constitutional and statutory protections afforded to those accused of a crime. So as this Court held in *Bell*, absent an actual adjudication of guilt, they cannot be punished. *Bell*, 441 U.S. at 535. Yet no

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[16] *See Estate of Booker v. Gomez*, 745 F.3d 405, 423 (10th Cir. 2014) ("To determine whether a use of force is excessive under the Fourteenth Amendment we consider three factors: (1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor."); *id.* at 426 (concluding there is no case law to support dismissal of a due process excessive force case solely based upon lack of evidence of illicit intent).

such adjudication occurred here in our present case.[17]

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *U.S. v. Salerno*, 481 U.S. 739, 755 (1987). Pretrial detainees do not surrender their liberty interest to be free of beatings and other abuses. "[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause ... [a]nd that right is not extinguished by lawful confinement, even for penal purposes." *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). "The interest of persons in the integrity of their bodies is a liberty interest of high order ... The order of this liberty interest is precisely as high among persons accused of crime as among

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[17] This concern is magnified by the numbers of pretrial detainees and length of time of their pretrial incarcerations. *See, e.g.*, Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 Cardozo L.Rev. 1947, 1955 (2005) (noting "the tens of thousands of American citizens subject to pretrial detentions each year"); *id.* at 1950 n.11 (compiling state and federal statistics and, specific to federal detainees, finding that incarceration "averaged approximately one month for individuals who were eventually able to meet bail, to eighty-one days for those never able to meet bail, and one-hundred-and-ten days for those denied bail."); Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U.Pa.L.Rev. 1009, 1054-55 (2013) (citing federal statistics and concluding that for at midyear 2011, local jail facilities in the U.S. held approximately 736,000 inmates, of which more than 60% were pretrial detainees).

persons unaccused of crime." *Norris*, 737 F.2d at 1152-53 (Doyle, J., concurring).

In *Salerno*, 481 U.S. at 750-51, this Court recognized the "importance and fundamental nature" of an individual's liberty interest, but also acknowledged that it may be infringed by a "sufficiently weighty" government interest in the balancing. But no cognizable government interest is served by the unreasonable and excessive application of force to a pretrial detainee when none is objectively justified by the totality of the then existing circumstances. That is simply prong two of the *Bell* due process analysis of how to determine punishment and also a restatement of the needless fetters, unnecessary hardships and lack of humanity forbidden at common law. The problem with application of the subjective Eighth Amendment convicted prisoner standard to pretrial detainees is that it condones the unreasonable application of force when none is objectively justified. As Judge Hamilton succinctly stated in dissent below, "[i]f a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was 'punished' without due process of law." *Kingsley*, 744 F.3d at 455 (Hamilton, J., dissenting).

Accordingly, and consistent with the second prong of the *Bell* analysis, the Court should apply the due process equivalent of a Fourth Amendment standard herein and recognize the distinction between the objectively reasonable application of force necessary to maintain order and enforce rules for pretrial detainees and the use of unnecessary and excessive force which goes above and beyond that

necessary to achieve these same ends. As the common law has long recognized, the differing liberty interests at stake between pretrial detainees and convicted prisoners demands no less.

CONCLUSION

Pretrial detainees, like all citizens, are entitled to the protection of the law from abuse at the hands of the government. When subjected to excessive force by their jailers, pretrial detainees must have justice and a fair opportunity to obtain that justice. The requirement imposed below and by other circuit courts that a detainee prove a defendant acted with some invidious intent not only unduly limits the opportunity for justice but is not compelled by this Court's precedent. Therefore, amicus submits that this Court should adopt the objective test of reasonable force propounded by the Petitioner and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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